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No. 99-

IN THE
# SUPREME COURT OF THE UNITED STATES

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IN RE: KATHY LYNN JOSENHANS, Petitioner

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## PETITION FOR A WRIT OF MANDAMUS

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## QUESTION PRESENTED FOR REVIEW

Whether an appeal, summarily dismissed by a partial panel of Eleventh Circuit on nonjurisdictional grounds for "lack of prosecution", is an abuse of the court's discretion where:

1) the appellant's notice of appeal was filed three days after the district court entered an order granting summary judgment on all counts of a civil rights action;

2) the Petitioner's final conforming brief was filed within thirty days from its original due date without calculating any extension requested and within the time of the requested seven day extension;

3) an answer brief was filed;

4) the appellant filed a fifty-four page nonconforming draft brief within the time prescribed by a clerk approved extension accompanied by motion to the court for an additional seven days to file a conforming brief;

5) the clerk dismissed the appeal thirty-six days after the appellant filed her conforming brief and one day after the appellees served their answer brief when a partial panel finally ruled on Petitioner's seven day extension request; and

6) the Circuit's actions dismissing the appeal are in derogation of its own Local Rules (L.R.), Internal Operating Policies (I.O.P.), case precedent, custom and practice.

## PARTIES TO THE PROCEEDING

Petitioner, Kathy Lynn Josenhans and her attorneys, Frederick C. Morello, Law Office of Frederick C. Morello, P.O. Box 1007, Daytona Beach, Florida 32115, appeared before the Eleventh Circuit Court of Appeals as plaintiff-appellant.

Respondent, Sherwood Medical Corporation, American Home Products Corp.; and American Home Products Corp. Group Insurance-Plan - United States and its attorneys, William Lawton, Dean, Ringers, Morgan and Lawton, P.O. Box 2928, Orlando, Florida 32802-2928 appeared before the Eleventh Circuit Court of Appeals as defendants-appellees.

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## PETITION FOR A WRIT OF MANDAMUS

Petitioner, Kathy Lynn Josenhans, respectfully prays that this Court grant her a writ of mandamus to review the clerk's order of dismissal for lack of prosecution dated December 11, 1998, (Appendix F) the order denying her emergency motions for reconsideration, dated January 25, 1999, (Appendix H) and the judgment and opinion of the United States Court of Appeals For The Eleventh Circuit entered on March 16, 1999. (Appendix J). The dismissal of this appeal is inconsistent with Eleventh Circuit's own local rules, prior practice, precedent and is an abuse of discretion. Petitioner requests this highest court of the United States of America to compel the Eleventh Circuit Court of Appeals to reinstate her appeal, previously dismissed on nonjurisdictional grounds for "lack of prosecution" and to reach a determination on the case's merits.

## OPINIONS BELOW

The court's December 11, 1998, order denying the petitioner's motion for one week extension of time to file her initial brief and the clerk's order of dismissal for "lack of prosecution" is set out in Appendix F. The court's January 25, 1999, order denying the petitioner's emergency motion for panel reconsideration of the Clerk of the Court's entry of dismissal, dated December 11, 1998, and to reinstate the appeal, appellant's motion for leave to file initial brief outside of the scheduled time with incorporated memorandum of law and panel consideration to vacate the clerk of the court's entry of dismissal, dated December 11, 1998, and to reinstate the appeal with incorporated memorandum of law is set out in Appendix H. The court's March 16, 1999, order denying the petitioner's emergency petition for rehearing en banc of the partial panel's order and/or emergency motion for panel clarification of this court's order dated January 25, 1999[1] is set out in Appendix J.

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[1] As part of this order, the court, *sua sponte*, denied a motion to reinstate the appeal and to file the brief and record excerpts out of time. The petitioner never filed these motions. Rather, the court's order *sua sponte* anticipated that:

> [it] can consider Appellant's [Petitioner's] request to reconsider the motions to reinstate the appeal and to file the brief and record excerpts out of time. Appellant has not yet sought reconsideration of those motions.

## JURISDICTION

The court's December 11, 1998, order denying Petitioner's motion for a one week extension of time and the clerk's entry of dismissal; the court's January 25, 1999, order denying the petitioner's emergency motions for reconsideration; and the court's *sua sponte* order denying the Petitioner's motion for en banc reconsideration to reinstate the appeal was entered on March 16, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a).

## STATEMENT OF THE CASE

Three days after entry of the District court's order granting summary judgment on all counts of a civil rights action, Petitioner filed her notice of appeal with the Eleventh Circuit. (Appendix A). On October 12, 1998, the Petitioner filed an unopposed motion for a thirty day extension of time to file her initial brief due to docket conflicts.[2] (Appendix B). The Petitioner never requested more than

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> On reconsideration, Appellant's [Petitioner's] motions to reinstate this appeal and to file her brief and record excerpts out of time are **DENIED**.

[2] The law office representing the Petitioner is a three attorney firm consisting of only one attorney who is licensed to practice in the Eleventh Circuit. Petitioner's attorney's office does not parcel out its appellate work, rather it handles 99% of its own appeals. As the only attorney licensed to practice before the Eleventh Circuit in the firm, the undersigned had the responsibility for drafting, editing and analyzing case law for the initial brief. The undersigned also has responsibility for ensuring the initial brief complied with the standards set forth in the Fed. R. App. P. and the Eleventh Circuit Local Rules. The undersigned has practiced before the Eleventh Circuit since October 23, 1990. The undersigned has handled approximately fifty appeals in state and federal appellate courts as primary appellate counsel since being licensed to practice law in October, 1987.

At the time of the brief's filing date, the undersigned and both of his associates were involved in a seven day medical malpractice trial in the case of *Stone v. Rosenthal*, Case No. 98-4801-AE in West Palm Beach, Florida, an external deadline over which the undersigned had no control. The trial started on October 13, 1998 and ended on October 21, 1998. The undersigned also had to file an initial brief on October 12, 1998, in *Techni-Search v. Pathtech Software Solutions, Inc.*,

a total of thirty days extension of time to file a conforming brief from its original due date. All of the Petitioner's motions for extensions of time were filed prior to the filing deadline set forth by the court.[3] None of the Petitioner's extensions of time were opposed. The clerk partially granted her initial motion granting the Petitioner a fourteen day extension of time on October 14, 1998, instead of the thirty days requested. On October 28, 1998, the Petitioner filed her second unopposed motion with the clerk requesting an additional fourteen day extension of time (Appendix C). The clerk again only partially granted this motion allowing the Petitioner a seven day extension of time on October 30, 1998. (Appendix D). Instead of filing a nonconforming brief with the clerk which, pursuant to Eleventh Cir. Local 32-4(c), would have allowed Petitioner fourteen days to correct any nonconformities based upon the clerk's custom and practice, Petitioner filed with the court, instead of the clerk, a third unopposed motion for an additional seven day extension of time on November 5, 1998, along with an attached fifty-four page nonconforming draft of her initial brief and copy to appellee's counsel. Petitioner requested seven days less time than Eleventh Circuit L.R. 32-4(c) provides to file her conforming brief. The draft brief was attached to show the court that Petitioner was not being dilatory or failing to prosecute her appeal. The Petitioner filed final

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*etc.*, Fifth District Court of Appeals, State of Florida, 5th DCA Case No.: 98-02237. Also, pending during this time was appellant's response to appellee's motion to dismiss in *Josenhans, Hendrix v. Sherwood, et. al.*, a related appellate case no. 98-3294. That response was timely filed on November 9, 1998. These conflicts were brought to the Eleventh Circuit's attention in Petitioner's original motion for extension dated October 12, 1998.

[3] Rule 6(b), Fed.R.Civ.P., differentiates between motions filed before the expiration of time to act and motions filed after the expiration of time. *McLaughlin v. City of LaGrange*, 662 F. 2d 1385, 1387 (11th Cir. 1981); *Also See Useden v. Acker*, 947 F. 2d 1563 (11th Cir. 1991).

While motions filed after the expiration of time to act, pursuant to Rule 6(b)(2), Fed.R.Civ.P., should be granted on a mere showing of "excusable neglect", motions filed before the expiration of time may be even more freely granted since the decision is completely within the court's discretion. *See, In the Matter of T. C. Morrow*, 502 F. 2d 520 (5th Cir. 1974).

conforming copies of her initial brief on November 12, 1998, as Petitioner indicated in her previous motion. Appellees served an Answer Brief within thirty days. The court had not yet ruled upon the appellant's November 5th motion for extension.

On December 11, 1998, thirty-six days after Petitioner had filed her motion with the court for a seven day extension of time to file a conforming brief, twenty-eight days after the Petitioner filed her initial conforming brief, and, one day after Appellees' answer brief was served, a partial panel denied Petitioner's motion for a seven day extension of time.[4] (Appendix F). The clerk then dismissed this appeal on that same day, December 11, 1998, for "lack of prosecution".[5] (Appendix F).

On December 17, 1998, one day after receiving the clerk's dismissal, the Petitioner filed an emergency motion for full panel consideration to vacate the clerk's entry of dismissal and reinstate

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[4] A single judge of the panel entered this order.

[5] The basis of dismissal was for "lack of prosecution". However, the Petitioner filed her notice of appeal three days after summary judgment was granted (27 days earlier than F.R.A.P. 4 mandates), filed three motions of extensions of time, a nonconforming draft brief, her initial conforming brief, and an answer brief was served. The case was also set for mediation.

Lack of prosecution has been interpreted as bad faith or disinterest in prosecuting the appeal. *See, infra, Sauviac v. Sentry Ins., et. al.* These record activities indicate anything but a lack of prosecution or disinterest in the prosecution of an appeal. The appellant's conforming brief was filed thirty (30) days from its original due date. Therefore, it cannot be credibly argued that the appellate process was unreasonably delayed without justification or with contumacious disregard of the appellate rules.

The instant action also has a companion case involving illegal wiretapping and invasion of privacy counts pending with the Eleventh Circuit styled *Kathy-Lynn Josenhans and Rose Anne Hendrix v. Sherwood Medical Corporation, Monty McGee, individually, and Barbara Lane*, Case No.: 98-3294. Ironically, a motion to dismiss the appeal in that case has been pending since November 9, 1998, with no ruling as of this date.

the appeal requesting that: the court vacate the order of dismissal and reinstate the appeal. (Appendix G).

On that same date, the Petitioner also filed an emergency motion for reconsideration of the clerk's entry of dismissal, motion to reinstate the appeal, and motion for leave to file her initial conforming brief outside of the scheduled time[6] (Appendix G). Petitioner requested the court to accept her nonconforming brief as timely filed and reinstate the appeal or, in the alternative, grant her leave to refile her initial conforming brief outside of the scheduled time. In this emergency motion, the Petitioner also cited to binding precedent holding that the court consider lesser sanctions prior to dismissal.

On January 25, 1999, a partial panel[7] entered an order holding that:

> Appellant's motion to reconsider this court's order dated December 11, 1998, denying her motion for a third extension of time to file her brief and record excerpts is DENIED.
> Appellant's motion to reinstate this appeal is DENIED.
> Appellant's motion to file her brief and record excerpts out of time is DENIED AS MOOT. (Appendix H).

The partial panel's order did not address the Petitioner's request in her motion that, pursuant to the court's own Local Rule, 32-4(c), it consider the filing of her nonconforming brief as timely

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[6] The conforming brief was sent back to Petitioner by the clerk with the clerk's order dismissing the appeal for lack of prosecution. (See Appendix F).

[7] Two panel judges entered this order.

filed – a practice the clerk has followed in prior cases.[8] The partial panel also did not address binding precedent of the Circuit cited by the Petitioner in her emergency motion, which recognized that dismissal is an ultimate sanction and lesser sanctions should be considered before resorting to the most extreme sanction a party can suffer.

On February 6, 1999, the Petitioner filed an emergency petition for en banc rehearing of the partial panel's order and/or emergency motion for panel clarification of this court's order dated January 25, 1999, requesting that the court specifically address the relief that she sought, which was the acceptance of her nonconforming brief as conditionally filed and/or consider sanctions less severe than that of dismissal. (Appendix I).

On March 16, 1999, the partial panel again ignored the Petitioner's requested relief.[9] Rather, *sua sponte*, the partial panel considered Petitioner's foreseeable motion for reconsideration of her prior motion for reinstatement of appeal and filing of brief and record excerpts out of time.[10] (Appendix J). The partial panel's order of March 16, 1999, and the clerk's prior entry of dismissal for "lack of prosecution" left the Petitioner with no available remedy except to seek a writ of mandamus from this Court to compel the Eleventh Circuit to reinstate the appeal and adjudicate this case upon its merits.

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[8] *See, infra* pp. 12-13, *Glisson v. Interim Serv. Inc.*, 11th Cir. appellate case No.: 97-2157; and *Golden v. School Board of Volusia*, 11th Cir. appellate case No.: 98-2041 (See attached exhibits 1 and 2 to Appendix I).

[9] The partial panel devotes the first half of its order justifying the clerk's decision to initially reject the petition for rehearing en banc.

[10] The Petitioner had not yet submitted a motion for reconsideration of reinstatement of appeal and filing of brief and record excerpts out of time for the court's consideration. The partial panel, rather, ignored the relief and clarification the Petitioner requested and, *sua sponte*, considered and denied Petitioner's anticipated motion for reconsideration of her motion for reinstatement of the appeal and filing of brief and record excerpts out of time. (Appendix J).

## REASONS FOR GRANTING THE WRIT

**I. Mandamus is an equitable remedy to compel the lower court to render an adjudication on the merits of this appeal, where the circuit abused its discretion, dismissing the appeal on nonjurisdictional grounds for lack of prosecution.**

In *Thermtron Products, Inc. et. al. v. Hermansdorfer*, U.S. District Judge, 423 U.S. 336 (1976), a district court impermissibly remanded a properly removed case citing to its busy docket. *Id.* at 337. The Petitioners argued, in part, that they "...had a federal right to have their case tried in federal court [and] that the [court] had no discretion to remand the case merely because of a crowded docket..." *Id.* at 340. This Court reasoned that:

> [a] 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Repeated decisions of this Court have established the rule...that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause. *Id.* at 352.[11]

This Court reversed the lower court reasoning that mandamus is appropriate where the court's decision is not based in law. *Id.* at 353. Similarly, in the instant action, the Petitioner is requesting that this Court compel the Eleventh Circuit to decide the

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[11] Admittedly, mandamus is a remedy in equity to be granted at the Court's discretion. *La Buy, United States District Judge v. Howes Leather Co.*, 352 U.S. 249, 313 (1957). However, mandamus is a remedy appropriate for situations, such as this case, where the court's decision resulted in an abdication of its judicial functions, depriving the parties of an adjudication on the merits of the action. *See La Buy*,at 256. Specifically, mandamus lies for the Court to exercise jurisdiction where judicial discretion has been abused. *Los Angeles Brush Manufacturing Corp. v. James, District Judge*, 272 U.S. 701, 706 (1927).

underlying case on its merits. The actions of a partial panel of the Eleventh Circuit and the clerk, dismissing the appeal for "lack of prosecution", evince an abuse of the court's discretion and were in derogation of its own local rules (L.R. 32-4, 42-1) and internal operating policies (I.O.P.) (applicable to L.R. 27-1 and L.R. 31-2) based upon prior custom and practice.

**II. Petitioner's motion for extension requested seven days less time than Eleventh Circuit Local Rule 32-4 provides, that if a nonconforming brief is filed by a party, the clerk issues a notice to correct any nonconformities by refiling a corrected brief within fourteen days.**

Eleventh Circuit Local Rule 32-4 states:

> Unless each copy of the brief, in the judgment of the clerk, conforms to this rule and to provisions of F.R.A.P. 32(a), the clerk may conditionally file the brief, subject to the requirement that the party file in the office of the clerk a complete set of replacement briefs which comply with F.R.A.P. and circuit rules within fourteen days of issuance of notice by the clerk that the briefs have been conditionally filed. The clerk's notice shall specify the matters requiring correction. The time for filing of the opposing party's brief runs from the date of service of the conditionally filed brief and is unaffected by the later substitution of corrected copies pursuant to this rule.

In the undersigned's prior cases in the Eleventh Circuit, the Circuit has consistently followed custom and practice evinced by its own rules and operating procedures providing for the conditional filing of nonconforming briefs and allowing counsel fourteen days to correct any nonconformities after written notice from the clerk. (See, attached Exh. "1" to petition for rehearing en banc (Appendix I), where another lawyer practicing before the Eleventh Circuit has had the same rule apply.) The local rules of the court should be

uniformly applied. As examples, the Petitioner cites two recent prior appeals to the Eleventh Circuit.

In *Glisson v. Interim Serv. Inc.*, appellate case no.: 97-2157, the court, in accordance with Local Rule 32-4, directed the undersigned counsel to correct the following nonconformities of his brief: incorrect cover color; and inadequate letter size and/or spacing. The court's notice specifically stated in bold capital letters **"HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE."** (See, attached exhibits 1 and 2 to Appendix I).

In *Golden v. School Board of Volusia*, a case where the undersigned counsel had no involvement, both appellants and appellees were given fourteen days to cure nonconformities in their briefs, in accord with L.R. 32-4, such as the failure to include a statement of the case, failure to include durable covers on the front and back, and failure to include a certificate of service. (See, attached comp. Exh. "2" to petition for rehearing en banc). (Appendix I).

In the instant case, the Petitioner submitted a fifty-four page nonconforming draft of her initial brief along with a motion to the court, instead of the clerk, requesting an additional seven days to submit conforming copies of her initial brief and record excerpts. Ironically, had the Petitioner submitted only the nonconforming brief to the clerk without her motion for extension, the Petitioner would be afforded fourteen days to correct any nonconformities in accord with L.R. 32-4 from the clerk, seven days more time than the Petitioner was requesting from the court in her motion. If the circuit is going to depart from its own practice, precedent and operating rules, procedural due process requires that it provide practitioners with prior notice.

## III. The circuit departed from its own precedent which recognizes that dismissal of an appeal is an ultimate sanction where lesser sanctions must be considered prior to dismissal.

The Eleventh Circuit has adopted the same rationale as the Fifth Circuit, as stated in *Marcaida v. Rascoe,* 569 F. 2d 828, 830 (5th Cir. 1978)[12] that the ". . .late filing of briefs is at most [a] nonjurisdictional [defect] in the prosecution of this appeal, which we consider insufficient to warrant dismissal."

Later, the court contrasted the failure to timely file a notice of appeal, which is a jurisdictional defect, to the failure of timely filing an initial brief which is nonjurisdictional and, therefore, governed by a more flexible standard. *In re: Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985). Similarly, the Fifth Circuit has reasoned that a court consider lesser sanctions prior to dismissal due to the severity of dismissal as a sanction. *Long v. Simmons*, 77 F.3d 878, 880 (5th Cir. 1996).

In *Sauviac v. Sentry Ins., et. al.*1997 U.S. Dist. LEXIS 7544 (E.D. La. May 16, 1997), the pertinent facts were that the appellants filed their brief four days late. *Sauviac*, at *3. The appellants additionally untimely filed other documents. *Id.* The appellants failed to even explain their filing delays. *Id.* The court reasoned that "there is no evidence of bad faith or disinterest in prosecuting the appeal. Thus, based on the short filing delays and the appellants' efforts to cure the defects in their appeal, the court determines that the conduct of the [appellants] was not sufficiently egregious to merit dismissal." *Id.* at *3 -*4.

In the instant action, the Petitioner in her emergency motion and memorandum requesting panel consideration to vacate the

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[12] The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard,* 661. F. 2d 1206, 1209 (11th Cir. 1981).

clerk's entry of dismissal dated December 11, 1998, to reinstate the appeal and in her petition for en banc rehearing and/or emergency motion for panel clarification, specifically requested the panel to at least consider lesser sanctions prior to imposing the ultimate sanction of dismissal. (Appendix G). *See, In re: Raymond L. Woodcock,* 1996 U.S. Lexis 33316 at * 4 (10th Cir. December 20, 1996) (holding that before choosing the extreme sanction of dismissal with prejudice, the district court must do at least one of the following: find bad faith or negligence, give appellant notice or opportunity to explain delay, consider prejudicial effect on other parties, or consider impact of sanction and available alternatives . . .); *Accord, United States of America v. Manning* 220 B.R. 328, 330 (E.D. TX. 1998); *Accord, In re: Michael Thomas MacInnis,* 1998 U.S. Dist. Lexis 10995 (S.D.N.Y. July 21, 1998). To date, no record evidence exists evincing the panel's consideration of sanctions lesser than the ultimate sanction of dismissal, explaining its departure from long standing practice of following L.R. 32-4, or to reasonably substantiate any finding to support a dismissal for lack of prosecution.

## IV. In violation of its own local rules, the court and the clerk never issued the Petitioner a notice of impending dismissal for lack of prosecution or an opportunity to cure such a dismissal.

Based on the circuit's prior practice and its own local rules, the Petitioner had no forewarning that the court intended such a departure by dismissing the case for lack of prosecution instead of an adjudication on the merits of the instant action. Specifically, Eleventh Circuit Local Rule 42-1(b) mandates that the clerk "shall issue a notice to counsel that upon the expiration of fourteen days from the date thereof the appeal will be dismissed for want of prosecution if the default has not been remedied." Appellant never received any such notice from the clerk or the court that a dismissal for lack of prosecution was pending. Once the court denied the appellant's motion for extension, the clerk summarily entered an order of dismissal for lack of prosecution. The time frame of filings

and amount of record activity evince anything but a "lack of prosecution" of this appeal.

## V. The language of recent revisions of the Eleventh Circuit Local Rules (12/98) is indicative of a more flexible policy governing extensions of time as opposed to an inflexible standard.

In the instant action, the Petitioner had no forewarning of the court's departure from its own custom and practice regarding extensions of time. The Petitioner never sought more than a total of thirty days to file her brief. Each motion for extension was timely filed.

Recent revisions to the Eleventh Cir. Local Rules and Internal Operating Policies have been amended suggesting a more flexible standard (12/98). Eleventh Cir. Local Rule 27-1 and the Eleventh Cir. I.O.P., as revised on 12/98, refer to the Clerk's authority to grant "moderate extensions of time."[13] Specifically, Eleventh Cir. Local Rule 27-1 states:

> "The clerk is authorized, subject to review by the court, to act for the court on the following opposed procedural motions:
>
> (19) to grant moderate extensions of time for filing briefs or other papers in appeals not yet assigned or under submission unless substantial reasons for opposition are advanced.

The Eleventh Circuit's previous I.O.P. pursuant to Eleventh Cir. Local Rule 31-2 as of February 1, 1998, however, stated that "the clerk is authorized to grant uncontested requests for short extension of time to file briefs." Specifically, Eleventh Cir. Local Rule, I.O.P. - 2, states: "The clerk is authorized to grant uncontested requests for short extensions of time to file briefs."

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[13] This standard remains unchanged as of the April, 1999, revisions.

The change in language from "short" to "moderate" is indicative of a more flexible, rather than a more stringent, inflexible standard governing extensions of time. In addition, the change in language from "uncontested" to "opposed" is also indicative of a more flexible standard governing extensions of time because the revisions give the clerk authority to grant moderate time extensions even when opposed. This amendment provides no notice to practitioners that the circuit court or the clerk would deviate from prior custom and practice. Nor does it indicate that appeals would be summarily dismissed for lack of prosecution if a thirty (30) day extension was sought.

## VI. The issues presented in this case are of substantial importance to the entire appellate process so that the actions of a partial panel of the Eleventh Circuit are not adopted as a model for docket clearing.

A right to have an adjudication on the merits of an appeal is fundamental to the Constitutional right allowing access to courts. In the instant action, the Petitioner filed her notice of appeal within three days, not thirty days, from the date of the district court's order granting summary judgment. Petitioner's failure to timely file a conforming brief is a nonjurisdictional defect not warranting an extreme sanction of dismissal, let alone a dismissal for "lack of prosecution". The result of the court's dismissal for lack of prosecution of the instant action, on nonjurisdictional grounds, forever bars the Petitioner from an adjudication of her appeal on its merits.

The partial panel's decision to dismiss the appeal on nonjurisdictional grounds also violates principles of due process. As already stated *supra,* the court's decision to dismiss the appeal was contrary to compliance with its own local rules and internal operating policies. If this was an intentional departure by the court, then it was without formal notification as a departure from its own rules, custom and practice. The appellee had already served its answer brief prior to the clerk's entry of dismissal for lack of prosecution. The instant action had already been set for appellate

mediation. (See Exh. 3 attachment to Appendix G). It is confounding and doubtful that the entire Eleventh Circuit would champion the actions of a partial panel reaching such an absurd result in the appellate process as exemplified by the facts of this appeal.

The Court's failure to adjudicate the merits of the instant action on nonjurisdictional grounds for lack of prosecution is an abuse of discretion under the facts presented. If this dismissal was a mistake, as a result of miscommunication between the office of the clerk and the panel, it could be better understood. But all indications are that this dismissal was no accident.

Based upon the court's abuse of discretion and the potential for the partial panel's action to become an innovative approach to docket clearing, this highest court should refuse to render its imprimatur.

## CONCLUSION

For the above reasons, a writ of mandamus should issue to compel the Eleventh Circuit to reinstate this appeal and decide this case upon its merits.

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fax: 904) 252-0921

## APPENDIX A

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO, FLORIDA**

***Filed***
***98Jul24***

**KATHY-LYNN JOSENHANS and**
**Plaintiff,**

**vs.** **CASE NO. 96-829-CIV-ORL-18A**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan & Lawton
200 E. Robinson 10th Floor
Orlando, Fl 32802

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that KATHY-LYNN JOSENHANS Plaintiff/Appellant, appeals to the United States Court of Appeals for the Eleventh Circuit the Order on Defendants' Motion for Summary Judgment on all claims entered by The Honorable G. Kendall Sharp, United States District Judge on July 21, 1998. Attached hereto is a copy of said Order.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the above designated address(s) this 23rd day of July, 1998.

s/_____

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
118 Orange Avenue
Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Attorney for Plaintiff

eb

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.**

**CASE NO: 98-3107**
**Lower Case 96-00829**
**Middle District of Florida**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES.** /

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan and Lawton
Post Office Box 2928
Orlando, Florida 32802-2928

**APPELLANT'S UNOPPOSED MOTION FOR A THIRTY (30) DAY EXTENSION OF TIME TO FILE ITS APPELLATE BRIEF AND RECORD EXCERPTS WITH INCORPORATED MEMORANDUM OF LAW**

Appellant, KATHY-LYNN JOSENHANS, pursuant to 11th Cir. R. 26-1 and Fed.R.App.P. 26(b) requests this Court to grant it a thirty (30) day extension of time to file its appellate and record excerpts on November 13, 1998. As grounds thereof, Plaintiff states:

1. On July 23, 1998, Plaintiff filed its Notice of Appeal.

2. Pursuant to Fed.R.App.P. 12(c), Appellant's Brief and Record Excerpts are due on October 14, 1998.

3. Plaintiff requires a thirty (30) day extension of time in which to file its Brief and Record Excerpts to ensure that all issues are properly addressed.

4. Since receipt of this Court's Memorandum to Counsel or Parties notifying Appellant of the filing deadline of Appellant's Brief, Appellant's counsel has had to attend and prepare for the following: respond to Defendant's motion for summary judgment in *Robinson v. Bell, et. al.*, Middle District (Orlando), Case No.: 96-1188-CIV-ORL-22C on September 28, 1998; file an appellate brief on October 12, 1998 in *Techni-Search v. Pathtech Software Solutions, Inc., etc.*, Fifth District Court of Appeals, State of Florida, 5th DCA Case No.: 98-02237; Plaintiff's counsel's office has been required to prepare for and attend depositions in the cases of: *Mallory, Meyers & Rennick v. Sebastian*, Case No. 95-30155-30 on September 8, 1998; *Bailey v. Volusia Co.*, Case No. 97-406-CIV-ORL-18A on September 9, 22 and 29, 1998; *Quay v. Abbott*, Case No. 97-754-CIV-ORL-19C on September 10 and 11, 1998; *Schelling v. Home Depot*, Case No: 98-294-CIV-ORL-18B on September 15, 1998; *Taylor v. Ormond Memorial Hospital*, Case No. 97-30022-CICI on September 15, 23 and 28, 1998; *McCall v. Volusia County*, Case No. 97-581-CIV-ORL-19B on September 16 and 30, 1998; *Smalbein v. Volusia County*, Claim No. 262-37-5427 on September 17 and 22, 1998; *Flowers v. Denny's*, Case No. 97-1075-CIV-ORL-22B on September 30 and October 2, 1998; *Padgett v. St. John's River Authority*, Case No. 98-56-CIV-J-10B, on October 5, 1998, *Butts v. Volusia County*, Case No. 98-922-CIV-ORL-22B, on October 6, 1998 in Orlando, Florida; *Mallory, Meyers, Rennick v. Sebastian*, Case No. 95-30155-30, on October 7, 1998 in Largo, Florida. Plaintiff's counsel is also required to prepare for and attend hearings in *Stone v. Rosenthal*, Case No. 98-4801-AE on September Case No. 97-30536-CICI-31 on September 15, 1998; and *Emejuru v. Ryan's*, Case No. 98-142-CIV-ORL-19C on September 29, 1998 in Orlando, Florida. Additionally, Plaintiff's counsel was also required to attend a mediation in the case of *Bahls v. Florida Health*

*Care*, Case No. 96-1195-CIV-J-21A on October 5, 1998. Also, Plaintiff's counsel is currently preparing for a seven (7) day trial in the case of *Stone v. Rosenthal*, Case No. 98-4801-AE in West Palm Beach, Florida.

5. Pursuant to Fed.R.App.P. 26(b), Appellant's counsel has consulted with Appellee's Counsel who has stated that he has does **not oppose** Appellant's motion for a thirty (30) day extension.

**MEMORANDUM OF LAW**

Pursuant to Fed.R.App.P. 26(b):

The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any action, or may permit an act to be done after the expiration of such time...

6. Appellant has filed its Motion for a Thirty (30) day extension of time prior to the deadline for filing its Appellate Brief and Record Excerpts.

**WHEREFORE,** Appellant, KATHY-LYNN JOSENHANS, requests a Thirty (30) day extension of time to file and serve its Appellate Brief and Record excerpts on or before November 13, 1998.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William Lawton, Esquire, Dean, Ringers, Morgan & Lawton, P.O. Box 2928 Orlando, FL 32802-2928 this 12th day of October, 1998.

s/

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
118 Orange Avenue
Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Attorney for Plaintiff/Appellant

**U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Kathy-Lynn Josenhans v. Sherwood Medical Corp. Dkt.No. 98-3107

11th Cir.R. 26.1 (see reverse) requires that a Certificate of Interested Persons And Corporate Disclosure Statement be included with each brief, petition, answer, motion or response filed by any party. You may use this form to fulfill this requirement. In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case (*please type or print legibly*):

Kathy-Lynn Josenhans

Sherwood Medical Corp.

American Health Products Corp.

American Home Products Corp. Insurance Plan-United States -

William E. Lawton

Dean, Ringers, Morgan & Lawton, P.A.

Law Offices of Frederick Charles Morello, P.A.

Frederick Charles Morello

## APPENDIX C

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.**

**CASE NO: 98-3107**
**Lower Case 96-00829**
**Middle District of Florida**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan and Lawton
Post Office Box 2928
Orlando, Florida 32802-2928

**APPELLANT'S UNOPPOSED MOTION FOR A FOURTEEN (14) DAY EXTENSION OF TIME TO FILE ITS APPELLATE BRIEF AND RECORD EXCERPTS WITH INCORPORATED MEMORANDUM OF LAW**

Appellant, KATHY-LYNN JOSENHANS, pursuant to 11th Cir. R. 26-1 and Fed.R.App.P. 26(b) requests this Court to grant it an additional fourteen (14) day extension of time to file its appellate and record excerpts on November 13, 1998. As grounds thereof, Plaintiff states:

1. On July 23, 1998, Plaintiff filed its Notice of Appeal.

2. Pursuant to this Court's Order granting Appellant an extension of time, Appellant's Brief and Record Excerpts are due on October 29, 1998.

3. Plaintiff requires an additional fourteen (14) day extension of time in which to file its Brief and Record Excerpts to ensure that all issues are properly addressed.

4. On or about October 13, 1998, Appellant filed an unopposed motion for a thirty (30) day extension of time. On or about October 14, 1998, this Court granted Appellant a fifteen (15) day extension of time to and including October 29, 1998 for filing appellant's brief. In this order granting Appellant an extension of time to and including October 29, 1998, this Court stated:

> This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date.

Given that the undersigned and his associate, Andrew Gust, have been in trial in the case of *Stone v. Rosenthal,* Case No. 98-4801-AE in West Palm Beach, Florida starting October 13, 1998 and lasting through October 21, 1998, Mr. Gust informed Anthony Ricciardi by telephone on October 21, 1998 that the court's filing deadline of October 29, 1998 would result in undue hardship on the undersigned. Mr. Ricciardi informed Mr. Gust to file another motion for an extension of time.

5. Since receipt of this Court's Memorandum to Counsel or Parties notifying Appellant of the filing deadline of Appellant's Brief, Appellant's ocunsel has had to attend and prepare for the following: respond to Defendant's motion for summary judgment in *Robinson v. Bell, et. al.,* Middle District (Orlando), Case No.: 96-1188-CIV-ORL-22C on September 28, 1998 and file

an appellate brief on October 12, 1998 in *Techni-Search v. Pathtech Software Solutions, Inc., etc.*, Fifth District Court of Appeals, State of Florida, 5th DCA Case No.: 98-02237. In addition, the undersigned has had to attend and prepare for depositions as already outlined in the Appellant's previous motion for a thirty (30) day extension of time.

6. Pursuant to Fed.R.App.P. 26(b), Appellant's counsel has consulted with Appellee's Counsel who has stated that he does not oppose Appellant's motion for an additional fourteen (14) day extension.

**MEMORANDUM OF LAW**

Pursuant to Fed.R.App.P. 26(b):

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any action, or may permit an act to be done after the expiration of such time...

7. Appellant has filed its Motion for an additional fourteen day (14) day extension of time prior to the deadline for filing its Appellate Brief and Record Excerpts which had originally been agreed upon by the parties.

**WHEREFORE**, Appellant, KATHY-LYNN JOSENHANS, requests an additional fourteen (14) day extension of time to file and serve its Appellate Brief and Record excerpts on or before November 13, 1998.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the above designated addressee(s) this 27th day of October, 1998.

s/

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Post Office Box 1007
118 Orange Avenue
Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Florida Bar No. 0714933
Attorney for Plaintiff(s)

**CASE NO. 98-3107**

*Kathy-Lynn Josenhans v. Sherwood Medical Corp.*

**APPELLANT'S CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11th Cir.R. 26.1 the Appellant files the following list of individuals with any known interest in the outcome of this appeal:

1) Kathy-Lynn Josenhans
2) Sherwood Medical Corp.
3) American Health Products Corp.
4) American Home Products Corp. Insurance Plan-United States
5) William E. Lawton
6) Dean, Ringers, Morgan & Lawton, P.A.
7) Frederick C. Morello
8) Law Offices of Frederick C. Morello, P.A.
9) Judge G. Kendall Sharp, U.S. District Judge, Middle District of Florida, Orlando Division

s/

Frederick C. Morello, Esq.
Fla. Bar No: 0714933
Attorney for Plaintiff/Apellant

**APPENDIX D**

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.**

**CASE NO: 98-3107**
**Lower Case 96-00829**
**Middle District of Florida**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan and Lawton
Post Office Box 2928
Orlando, Florida 32802-2928

**APPELLANT'S MOTION FOR A SEVEN (7) DAY EXTENSION OF TIME TO FILE ITS APPELLATE BRIEF AND RECORD EXCERPTS WITH INCORPORATED MEMORANDUM OF LAW**

Appellant, KATHY-LYNN JOSENHANS, pursuant to 11th Cir. R. 26-1 and Fed.R.App.P. 26(b) requests this Court to grant it an additional seven (7) day extension of time to file its appellate and record excerpts on November 13, 1998. As grounds thereof, Plaintiff states:

1. On July 23, 1998, Plaintiff filed its Notice of Appeal.

2. Pursuant to this Court's Order granting Appellant an extension of time, Appellant's Brief and Record Excerpts are due on November 6, 1998.

3. Plaintiff requires an additional seven (7) day extension of time in which to file its Brief and Record Excerpts to ensure that all issues are properly addressed.

4. On or about October 13, 1998, Appellant filed an unopposed motion for a thirty (30) day extension of time so that deadline to file its initial brief would be to and including November 13, 1998. On or about October 14, 1998, this Court granted Appellant a fifteen (15) day extension of time to and including October 29, 1998 to file Appellant's brief. Appellant, in its motion for an additional fourteen (14) day extension of time filed on or about October 27, 1998, notified this Court of the undue hardship that would be imposed on it by this Court's filing deadline of October 29, 1998. This Court granted Appellant only an additional seven (7) days to file its appellate brief up to and including November 6, 1998.

5. Appellant's attorneys have worked diligently to prepare Appellant's initial brief with record excerpts. (A draft of which is attached hereto). However, given the extent of facts and issues Appellant raises in its initial brief requests an additional seven (7) days to file its initial brief with record excerpts.[1]

6. Pursuant to Fed.R.App.P. 26(b), Appellant's counsel has attempted to consult with Appellee's counsel. Appellees' counsel stated that he would have to confer with his client before stating a position to this motion.

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[1] The additional seven days requested by the Appellant to file its by November 13, 1998 is the same amount of time Appellant had requested in both its unopposed motion for a thirty extension of time and its motion for a fourteen day extension of time.

## MEMORANDUM OF LAW

Pursuant to Fed.R.App.P. 26(b):

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any action, or may permit an act to be done after the expiration of such time...

7. Appellant has filed its Motion for an additional seven day (7) day extension of time prior to the deadline for filing its Appellate Brief and Record Excerpts which had originally been agreed upon by the parties.

**WHEREFORE,** Appellant, KATHY-LYNN JOSENHANS, requests an additional seven (7) day extension of time to file and serve its Appellate Brief and Record excerpts on or before November 13, 1998.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William Lawton, Esquire, Dean, Ringers, Morgan & Lawton, P.O. Box 2928 Orlando, FL 32802-2928 this 4th day of November, 1998.

s/_____

FREDERICK C.MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
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Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Attorney for Plaintiff/Appellant

**CASE NO:98-3107**

*Kathy-Lynn Josenhans v. Sherwood Medical Corp. et. al.*

**APPELLANT'S CERTIFICATE OF INTERESTED PERSONS**

Pursuant to the 11th Cir.R.26.1, the Appellant files the following list of individuals with any known interest in the outcome of this appeal:

1) Kathy-Lynn Josenhans - Appellant/Plaintiff

2) Sherwood Medical Corp. - Appellee/Defendant

3) American Health Products Corp. - Appellee/Defendant

4) American Home Products Corp. Insurance Plan-United States - Appellee/Defendant

5) William E. Lawton - Counsel for the Appellees/Defendants

6) Dean, Ringers, Morgan & Lawton, P.A. - Counsel for the Appellees/Defendants

7) Frederick C. Morello - Counsel for the Appellant/Plaintiff

8) Law Offices of Frederick C. Morello, P.A. - Counsel for the Appellant/Plaintiff

9) Judge G. Kendall Sharp, U.S. District Judge, Middle District of Florida, Orlando Division

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

***Received NOV 13 1998***

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.** **CASE NO: 98-3107**
**District Court No: 96-00829-CV-ORL-18A**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
DEAN, RINGERS, MORGAN & LAWTON
200 E. Robinson Street, Suite 1020
Orlando, FL 23801

APPELLANT'S INITIAL BRIEF

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Attorney for Plaintiff/Appellant

**APPENDIX F**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

No. 98-3107

***Filed***
***DEC 11 1998***

**KATHY-LYNN JOSENHANS,**
**Plaintiff/Appellant,**

versus

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, Et. Al.,**
**Defendants/Appellees.**

On Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Apellant's motion for an extension of time up to and including November 13, 1998 to file the initial brief and record excerpts is **DENIED**.

s/
E. Carnes
UNITED STATES CIRCUIT JUDGE

*IN THE UNITED STATES COURT OF APPEALS*
*ELEVENTH CIRCUIT*
56 Forsyth Street, N.W.
Atlanta, Geogia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
of Case and Names of Parties

Richard D. Sletten
Clerk, U.S. District Court
80 N. Hughey Ave., Floor2, Suite 218
Orlando, FL 32801

RE: 98-3107 Josenhans v. Sherwood Medical Corp.
DC DKT No.: 96-00829 CV-ORL-18A

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The enclosed certified copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court.

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,

s/
THOMAS K. KAHN, Clerk

Reply to: Anthony Ricciardi (404) 335-6177

Encl.

DIS-2 (5/91)

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 98-3107

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*Filed*
*DEC 11 1998*

**KATHY-LYNN JOSENHANS,**
**Plaintiff/Appellant,**

versus

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, Et. Al.,**
**Defendants/Appellees.**

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On Appeal from the United States District Court for the
Middle District of Florida

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**ENTRY OF DISMISSAL**

Pursuant to 11th Cir.R. 42-1(b), this appeal is hereby dismissed for want of prosecution because the appellant has failed to file the initial brief and record excerpts within the time fixed by the rules, effective this 11th day of December, 1998.

THOMAS K. KAHN
Clerk of the United States Court of Appeals for the Eleventh Circuit
s/
Anthony Ricciardi
Deputy Clerk
FOR THE COURT - BY DIRECTION
ORD-40
5/91

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.** **CASE NO: 98-3107**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan and Lawton
Post Office Box 2928
Orlando, Florida 32802-2928

**APPELLANT'S EMERGENCY MOTION FOR PANEL CONSIDERATION TO VACATE THE CLERK OF THE COURT'S ENTRY OF DISMISSAL DATED DECEMBER 11, 1998 AND TO REINSTATE THE APPEAL WITH INCORPORATED MEMORANDUM OF LAW**

Appellant, KATHY-LYNN JOSENHANS, pursuant to 11th Cir. R. 27-1 requests this Court reverse its entry of dismissal in the above styled action. As grounds thereof, Plaintiff states:

1. Appellant's attorney's office is a three attorney[1] firm consisting of only one (1) attorney who is licensed to practice in the Eleventh Circuit. Appellant's attorney's office does not parcel out its appellate work, rather it handles 99% of its own appeals. As the only attorney licensed to practice before the 11th Circuit, the undersigned had the responsibility for drafting, editing and analyzing case law for the initial brief. The undersigned also has responsibility for ensuring the initial brief complied with the standards set forth in the Fed. R. App. P. and the 11th Circuit Local Rules.

2. On July 21, 1998, the trial court entered summary judgment on Plaintiff's entire claim. Within two (2) days thereafter, Appellant timely served her notice of appeal.[2]

3. On September 8, 1998, Appellant received the record on appeal which was dated September 4, 1998. (See, attached Exh. "1"). The memorandum to counsel attached to Appellant's Brief and Record Excerpts stated "Appellant's Brief And Record Excerpts Are Due Within Forty (40) Days From This Date."

4. Pursuant to the time calculations set forth in Fed. R. App. P. 25(2)(B) and 26(b), Appellant's initial brief was timely filed if mailed by October 21, 1998.[3] Nonetheless, exercising extreme caution in preserving the Client's right to appeal, Appellant's counsel calculated the forty day deadline for filing its initial brief as forty

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[1] One of the undersigned's two (2) associates recently passed the Florida Bar exam and was admitted to practice in Florida on October 5, 1998 and, therefore, was only licensed to practice law approximately two (2) weeks prior to original deadline for filing the initial brief.

[2] The undersigned served this notice of appeal 28 days prior to the thirty deadline for filing the notice of appeal.

[3] Forty days from receipt of the record is October 18, 1998. Pursuant to Fed. R. App. P. 26(c), three additional days are added for service by mail. Additionally, pursuant to Fed. R. App. P. 25(B), A brief "is timely filed...if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail..." Therefore, Appellant's initial brief would have been timely if mailed on October 21, 1998.

days from September 4, 1998, even though the record was not received until September 8, 1998. Appellant did not add any additional days for mailing, as provided by Fed. R. App. P. 26, and did not factor into its calculation that pursuant to Fed. R. App. P. 25(2)(B), a brief is timely filed "if on or before the last day for filing, it is (i) mailed to the clerk by First-Class Mail..." Appellant stated in its unopposed motion for a thirty (30) day extension of time that its initial brief was due to be filed on October 14, 1998, giving himself a week less than prescribed by the Fed. R. App. P. and the 11th Circuit Local Rules to file the initial brief.

5. Appellant's unopposed motion for a thirty (30) day extension of time was filed on October 13, 1998,[4] prior to even the most conservative calculation of the deadline for filing the initial brief. Pursuant to Fed. R. App. P. 26(b), Appellant's counsel conferred with Appellees' counsel prior to filing this motion. Appellees' counsel informed Appellant's counsel that he did not oppose Appellant's motion for a thirty (30) day extension of time. (See, attached Exh. "2"). Also in his correspondence, Appellees' counsel informed Appellant's counsel that he has noted on his calendar that Appellant's "...brief will be due on or before November 13, 1998."

6. Although Appellee's counsel had agreed to a thirty day motion for extension of time, Appellant's counsel conferred with Appellee's counsel prior to filing each of its additional motions for extension of time. While Appellee's counsel did not state a position regarding the additional motions, Appellee's counsel did not file any motions opposing Appellant's motions for an extension of time which fell within the original stipulation of 30 days.

7. On October 14, 1998, Appellant's unopposed thirty (30) day motion for an extension of time was granted in part for two

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[4] While the motion is titled Appellant's unopposed motion for a thirty (30) day extension, the undersigned requested that this Court grant him up to and including November 13, 1998 as the date of filing. This was twenty-three (23) days beyond the October 21, 1998 filing deadline for the initial brief.

weeks to file its initial brief on October 29, 1998. As stated in paragraph three (3), pursuant to the time calculations set forth in Fed. R. App. P. 25(2)(B) and 26(b), Appellant's initial brief was timely without any extension of time if mailed by mailed by October 21, 1998. Therefore, the clerk's decision granted Appellant a seven (7) day extension of time because to file the initial brief on October 29, 1998, Appellant would have had to send the brief via overnight mail by October 28, 1998.

8. In the order granting Appellant a seven (7) day extension of time, the order states:

> This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date.

Respectful of this Court's concern that deadlines be met and given that the undersigned and both of his associates were in the seven (7) day medical malpractice trial in the case of Stone v. Rosenthal, Case No. 98-4801-AE in West Palm Beach Florida, an external deadline over which the undersigned had no control, and had to file an initial brief was due to be filed on October 12, 1998 in Techni-Search v. Pathtech Software Solutions, Inc., etc., Fifth District Court of Appeals, State of Florida, 5th DCA Case No.: 98-02237. Andrew Gust informed Anthony Ricciardi by telephone on October 21, 1998, that the Court's filing deadline of October 29, 1998, would result in undue hardship to the undersigned. Also, pending during this time was Appellant's response to Appellee's motion to dismiss in Josenhans, Hendrix v. Sherwood, et. al., a related appellate case no. 98-3294. This response was timely filed on November 9, 1998. A detailed schedule of the undersigned's schedule during the months of September and October is set forth on page two of Appellant's initial unopposed motion for a thirty (30) day extension of time filed on October 13, 1998.

9. The Stone v. Rosenthal trial started on October 13, 1998 and ended on October 21, 1998. Exercising his best efforts to

complete the brief in a timely fashion and having just completed trial on October 21, 1998, the undersigned filed a motion on October 28, 1998, prior to the deadline for filing the initial brief, requesting an additional two week extension. The additional amount of time requested by the undersigned was the same amount of time initially requested in his original unopposed motion for a thirty (30) day extension.

10. The clerk of this Circuit only granted a one (1) week extension to file the brief by November 6, 1998. At this point, the undersigned had completed a draft of the brief and needed an additional week, again the same amount of time requested in the original unopposed motion for a thirty (30) day extension of time. Even though the Appellee's counsel had originally agreed to a thirty (30) day extension of time, Appellant's associate again consulted with Appellee's counsel prior to filing the motion for an additional seven days and filed its motion for a seven day extension of time on November 5, 1998, prior to the filing deadline of November 6, 1998. Wanting to show the court that Appellant's office was not being dilatory and respectful of this Court's deadlines, the undersigned filed a copy of his initial brief, which exceeded 50 pages, in support of his its motion for a seven day extension of time.

11. The copy of the Appellant's draft brief that was filed as part of motion for a seven day extension admittedly did not conform to the formatting requirements of the 11th Cir. and the Fed. R. App. P., pursuant to 11th Circuit Local Rule 32-4:

> Unless each copy of the brief, in the judgment of the clerk, conforms to this rule and to provisions of FRAP 32(a), the clerk may conditionally file the brief, subject to the requirement that the party file in the office of the clerk a complete set of replacement briefs which comply with FRAP and circuit rules within 14 days of issuance of notice by the clerk that the briefs have been conditionally filed. The clerk's notice shall specify the matters requiring correction. The time for filing of the opposing party's brief runs from the date of service of the conditionally filed brief

and is unaffected by the later substitution of corrected copies pursuant to this rule.

In light of this rule, Appellant timely filed a copy of the initial draft brief on November 5, 1998, prior to the November 6, 1998, deadline set forth by this Court and then resubmitted confirming copies within one (1) week of the submission of the nonconforming copy.

12. The total time on Appellant's three (3) motions to extend did not exceed the original thirty (30) days requested in Appellant's original motion for extension of time.

13. All three (3) of Appellant's original motions for extension of time were filed prior to the filing deadline set forth by this Court.

14. Appellant's original thirty (30) day extension of time was unopposed by Appellee's counsel. Consistent with this agreement, Appellee never filed a motion opposing Appellant's additional two motions for extension of time.

15. On Thursday November 12, 1998, the undersigned filed a final copy of his initial brief conforming to the 11th Cir. Local Rules and Fed. R. App. P. (The original briefs and the appendix have been resubmitted to this Court as part of these motions).

16. On December 10, 1998, the Appellee served a copy of its Answer Brief.

17. Upon receipt of Appellee's Answer Brief, the undersigned reviewed the Answer Brief and had already began to prepare a Reply Brief.

18. On December 11, 1998, thirty-six (36) days after Appellant filed its final motion for a seven (7) day extension of time, which included a draft of the initial brief and twenty-eight (28) days after Appellant filed its initial brief, and one (1) day after the

Appellee's served their Answer Brief, a single member of this Court entered an order denying Appellant's motion for a seven day extension and the Clerk entered an order of dismissal on the same day.

19. On December 14, 1998, Appellant's office received a notice of mediation, dated December 11, 1998, the same date on which this Court entered its order of dismissal. (See, attached Exh. "3").

20. Prior to receipt of this court's order of dismissal, Appellant's office had begun to prepare to the comply with this Court's notice of mediation.

21. The Clerk's entry of an order of dismissal causes the Appellant irreparable harm because it will forever bar Appellant from having her case decided on the merits.

22. Due to the severity of harm resulting from the court's order, the undersigned requests this court excuse him from any resulting inadvertent non-compliance with 11th Circuit local rule 27(b).

## MEMORANDUM OF LAW

When the undersigned filed his motion for a seven day extension of time along with a nonconforming copy of the initial brief prior to the deadline, to 11th Circuit Local Rule 32-4 allows the clerk to conditionally file this copy on the condition that a confirming copy be provided within 14 (fourteen) days of the issuance of notice by the clerk that the briefs have been conditionally filed. As such, when the motion for a seven (7) day extension was filed, the undersigned intentionally attached a nonconforming copy of the initial brief to also be filed. This nonconforming copy of the initial brief was timely filed on approximately November 5, 1998, one day prior to the November 6, 1998 deadline for filing the initial brief. Within seven (7) days of filing this nonconforming copy of

the initial brief, the undersigned remedied all nonconformities to the initial brief and filed the conforming brief on November 13, 1998.

In Long v. Simmons, 77 F.3d 878, 880 (5th Cir. 1996), the Fifth Circuit stated that a dismissal "is appropriate only if the failure to comply with the court order was the result of purposeful delay or contumaciousness and the record reflects that the district court employed lesser sanctions before dismissing the action." In the instant case, no such showing can be made because any delay in filing the initial brief is remedied by the timely filing of the nonconforming copy of the initial brief on November 5, 1998.

Assuming, arguendo, that the undersigned is mistaken in his interpretation of the 11th Local Rule 32-4 of the effect of filing a nonconforming copy of the initial brief U.S. Supreme Court stated:

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect, it is clear that excusable neglect under [FRCP] 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the [opposing party], the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Pioneer Ins. Servs Co. vs. Brunswick Assoc., Ltd. Partnership, 507 U.S. 380, 391 (1993).

In the instant case, there can be no pleading of prejudice to the Appellees because they have already served their answer brief on December 10, 1998. Additionally, Appellees' counsel agreed to Appellant's motion for a thirty (30) day extension of time and never

filed motions in opposition to Appellant's motions for extension of time. All of Appellant's motions were filed prior to the deadline for filing the initial brief.

In the instant case, Plaintiff's initial brief was due to be filed on November 6, 1998. Prior to this date, Plaintiff filed a motion for extension on November 5, 1998 and filed a non conforming copy of its initial brief along with its motion for extension. Within one week thereafter, Plaintiff filed a conforming copy of its initial brief with this court.

The dismissal of this appeal results in irreparable harm to the Plaintiff as it forever bars her from having a court decide her claim on the merits. Additionally, the Plaintiff had already begun to prepare a reply brief and begun preparation on compliance with this Court's notice of mediation.

Plaintiff's timely filed notice of appeal, three (3) motions for extensions, initial brief, preparation for mediation and reply brief, and Defendant's Answer Brief are signs of a case in the midst of prosecution, rather than signs of case with no record activity indicating a failure to prosecute which is a basis for the clerk's entry of an order of dismissal.

**WHEREFORE,** Appellant, KATHY-LYNN JOSENHANS, requests this Court to vacate its order entering dismissal and reinstate Appellant's Appeal.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and facsimile to William Lawton, Esquire, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, FL 32802-2928 this 17th day of December, 1998.

s/

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
Daytona Beach, Florida 32115
(904) 252-0754
Fax (904) 252-0921
Attorney for Plaintiff/Appellant

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

***Plaintiff's Exhibit 1***

September 4, 1998

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 98-3107 Josenhans v. Sherwood Medical Corp.
DC DKT NO.: 96-00829 CV-ORL-18A

---

Pursuant to Fed. R. App. P. 12 (c), be advised that the record is complete for purposes of appeal. APPELLANT'S BRIEF AND RECORD EXCERPTS DUE WITHIN FORTY (40) DAYS FROM THIS DATE. This is the only notice you will receive concerning the due date for filing briefs. See Fed. R. App. P. 28, 30, 31 and 32, and the corresponding circuit rules for further information on preparing briefs and record excerpts. Motions for extension of time to file a brief are frowned upon by the court.

Enclosed is an indexed copy of certified district court docket entries which shows court papers certified t this court as the record. Counsel or parties are requested to use this docket sheet and their own file copies of the court papers in preparing the brief and record excerpts. Counsel or parties may also review the record at the office of the district court clerk. Please refer to the enclosed sheet for information on referencing the record.

Upon notice that all appellees' briefs have been filed, the record will be promptly sent to this office by the district court clerk.

Sincerely,
s/
THOMAS K. KAHN, CLERK

Reply To: Anthony Ricciardi (404) 335-6177
Please be sure to have filed an appearance of counsel form.
BR-2 (3/98)

DEAN, RINGERS, MORGAN AND LAWTON

*VIA FACSIMILE TRANSMISSION*

***Plaintiff's Exhibit 2***

October 12, 1998

Frederick C. Morello, Esquire
Frederick C. Morello, P.A.
Post Office Box 1007
Daytona Beach, Florida 32115

Re: Kathy Josenhans v. Sherwood Medical Company, et al.

Dear Mr. Morello:

With regard to the above-matter and pursuant to your office's request for an additional 30 days in which to file your initial appellate brief, even though you have placed some arbitrary deadlines on us in the past, in the spirit of cooperation we will agree. We have noted our calendar that your brief will be due on or before November 13, 1998.

I assume that if we request an extension for filing our reply brief, you will not oppose it.

If you have any questions about this, please give me a call.

Very truly yours,
s/
WILLIAM E. LAWTON

WEL/mt
96-2417

CIRCUIT MEDIATION OFFICE

***UNITED STATES COURT OF APPEALS***
***ELEVENTH JUDICIAL CIRCUIT***
56 Forsyth Street, N.W.
Atlanta, Geogia 30303

December 11, 1998

***Plaintiff's Exhibit 3***

Frederick C. Morello, Esq.
P.O. Box 1007
Daytona Beach, FL 32115

William Lawton, Esq.
Lamar D. Oxford, Esq.
P.O. Box 2928
Orlando, FL 32802

Dear Counsel:

RE: 98-3107 Josenhans v. Sherwood Medical Corp.

Notice of Mediation Conference

This appeal has been selected for a mediation conference under Eleventh Circuit Rule 33-1. A mediation conference will be held by telephone on Wednesday, December 30, 1998, at 2 p.m. Eastern Time. I will contact you at the telephone numbers listed on the Civil Appeal Statement form. Please allow two hours for this conference. If this date presents a conflict for you with a previously scheduled court appearance, please call the administrative manager, Jo Ann Knapp, at 404-335-6260, to suggest other dates when all counsel are available.

The purposes of the mediation conference are (1) to explore possibilities for settlement of the dispute, (2) to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the case, and (3) to identify and clarify issues presented in the

appeal. The enclosed document provides information about mediation conferences and mediation representation.

You are identified on the Civil Appeal Statement form as the attorneys with primary responsibility for this case. You are expected to have authority to respond to settlement proposals that are consistent with your client's interest. If you have a brief due before the conference date and would like to request an extension, please read Eleventh Circuit Rule 33-1(e) and the enclosed document. If you file a brief before the conference date please send me a copy. I recommend you send me a "Confidential Mediation Statement" assessing the case. I will not share your statement with the other side, and it will not become part of the court file.

Sincerely,

s/
Catherine G. Novack
Mediator

Encl.

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.**

**CASE NO: 98-3107**
**Lower Case 96-00829**
**Middle District of Florida**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
Dean, Ringers, Morgan and Lawton
Post Office Box 2928
Orlando, Florida 32802-2928

**APPELLANT'S EMERGENCY MOTION FOR PANEL RECONSIDERATION OF THE CLERK OF THE COURT'S ENTRY OF DISMISSAL DATED DECEMBER 11, 1998 AND TO REINSTATE THE APPEAL AND APPELLANT'S MOTION FOR LEAVE TO FILE INITIAL BRIEF OUTSIDE OF THE SCHEDULED TIME WITH INCORPORATED MEMORANDUM OF LAW**

Appellant, KATHY-LYNN JOSENHANS, pursuant to 11th Cir. R. 27-1 requests this Court reverse its entry of dismissal in the above styled action. As grounds thereof, Appellant states:

1. Appellant's attorney's office is a three attorney[1] firm consisting of only one (1) attorney who is licensed to practice in the Eleventh Circuit. Appellant's attorney's office does not parcel out its appellate work, rather it handles 99% of its own appeals. As the only attorney licensed to practice before the 11th Circuit, the undersigned had the responsibility for drafting, editing and analyzing case law for the initial brief. The undersigned also has responsibility for ensuring the initial brief complied with the standards set forth in the Fed. R. App. P. and the 11th Circuit Local Rules.

2. On July 21, 1998, the trial court entered summary judgment on Plaintiff's entire claim. Within two (2) days thereafter, Appellant timely served her notice of appeal.[2]

3. On September 8, 1998, Appellant received the record on appeal which was dated September 4, 1998. (See, attached Exh. "1"). The memorandum to counsel attached to Appellant's Brief and Record Excerpts stated "Appellant's Brief And Record Excerpts Are Due Within Forty (40) Days From This Date."

4. Pursuant to the time calculations set forth in Fed. R. App. P. 25(2)(B) and 26(b), Appellant's initial brief was timely filed if mailed by October 21, 1998.[3] Nonetheless, exercising extreme caution in preserving the Client's right to appeal, Appellant's counsel calculated the forty day deadline for filing its initial brief as forty

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[1] One of the undersigned's two associates recently passed the Florida Bar exam and was admitted to practice in Florida on October 5, 1998 and, therefore, was only licensed to practice law approximately two weeks prior to original deadline for filing the initial brief.

[2] The undersigned served this notice of appeal 28 days prior to the thirty deadline for filing the notice of appeal.

[3] Forty days from receipt of the record is October 18, 1998. Pursuant to Fed. R. App. P. 26(c), three additional days are added for service by mail. Additionally, pursuant to Fed. R. App. P. 25(B), A brief "is timely filed...if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail..." Therefore, Appellant's initial brief would have been timely if mailed on October 21, 1998.

days from September 4, 1998, even though the record was not received until September 8, 1998. Appellant did not add any additional days for mailing, as provided by Fed. R. App. P. 26, and did not factor into its calculation that pursuant to Fed. R. App. P. 25(2)(B), a brief is timely filed "if on or before the last day for filing, it is (i) mailed to the clerk by First-Class Mail..." Appellant stated in its unopposed motion for a thirty (30) day extension of time that its initial brief was due to be filed on October 14, 1998, giving himself a week less than prescribed by the Fed. R. App. P. and the 11th Circuit Local Rules to file the initial brief.

5. Appellant's unopposed motion for a thirty (30) day extension of time was filed on October 13, 1998,[4] prior to even the most conservative calculation of the deadline for filing the initial brief. Pursuant to Fed. R. App. P. 26(b), Appellant's counsel conferred with Appellees' counsel prior to filing this motion. Appellees' counsel informed Appellant's counsel that he did **not oppose** Appellant's motion for a thirty (30) day extension of time. (See, attached Exh. "2"). Also in his correspondence, Appellees' counsel informed Appellant's counsel that he has noted on his calendar that Appellant's "...brief will be due on or before November 13, 1998."

6. Although Appellee's counsel had agreed to a thirty day motion for extension of time, Appellant's counsel conferred with Appellee's counsel prior to filing each of its additional motions for extension of time. While Appellee's counsel did not state a position regarding the additional motions, Appellee's counsel did **not** file any motions opposing Appellant's motions for an extension of time which fell within the original stipulation of 30 days.

7. On October 14, 1998, Appellant's unopposed thirty (30) day motion for an extension of time was granted in part for two

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[4] While the motion is titled Appellant's unopposed motion for a thirty day extension, the undersigned requested that this Court grant him up to and including November 13, 1998 as the date of filing. This was twenty-three days beyond the October 21, 1998 filing deadline for the initial brief.

weeks to file its initial brief on October 29, 1998. As stated in paragraph three (3), pursuant to the time calculations set forth in Fed. R. App. P. 25(2)(B) and 26(b), Appellant's initial brief was timely without any extension of time if mailed by mailed by October 21, 1998. Therefore, the clerk's decision granted Appellant a seven (7) day extension of time because to file the initial brief on October 29, 1998, Appellant would have had to send the brief via overnight mail by October 28, 1998.

8. In the order granting Appellant a seven (7) day extension of time, the order states:

> This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date.

Respectful of this Court's concern that deadlines be met and given that the undersigned and both of his associates were in the seven (7) day medical malpractice trial in the case of *Stone v. Rosenthal*, Case No. 98-4801-AE in West Palm Beach Florida, an external deadline over which the undersigned had no control, and had to file an initial brief was due to be filed on October 12, 1998 in *Techni-Search v. Pathtech Software Solutions, Inc., etc.*, Fifth District Court of Appeals, State of Florida, 5th DCA Case No.: 98-02237. Andrew Gust informed Anthony Ricciardi by telephone on October 21, 1998, that the Court's filing deadline of October 29, 1998, would result in undue hardship to the undersigned. Also, pending during this time was Appellant's response to Appellee's motion to dismiss in *Josenhans, Hendrix v. Sherwood, et. al.*, a related appellate case no. 98-3294. This response was timely filed on November 9, 1998. A detailed schedule of the undersigned's schedule during the months of September and October is set forth on page two of Appellant's initial unopposed motion for a thirty (30) day extension of time filed on October 13, 1998.

9. The *Stone v. Rosenthal* trial started on October 13, 1998 and ended on October 21, 1998. Exercising his best efforts to

complete the brief in a timely fashion and having just completed trial on October 21, 1998, the undersigned filed a motion on October 28, 1998, prior to the deadline for filing the initial brief, requesting an additional two week extension. The additional amount of time requested by the undersigned was the same amount of time initially requested in his original unopposed motion for a thirty (30) day extension.

10. The clerk of this Circuit only granted a one (1) week extension to file the brief by November 6, 1998. At this point, the undersigned had completed a draft of the brief and needed an additional week, again the same amount of time requested in the original unopposed motion for a thirty (30) day extension of time. Even though the Appellee's counsel had originally agreed to a thirty (30) day extension of time, Appellant's associate again consulted with Appellee's counsel prior to filing the motion for an additional seven days and filed its motion for a seven day extension of time on November 5, 1998, prior to the filing deadline of November 6, 1998. Wanting to show the court that Appellant's office was not being dilatory and respectful of this Court's deadlines, the undersigned filed a copy of his initial brief, which exceeded 50 pages, in support of his its motion for a seven day extension of time.

11. The copy of the Appellant's draft brief that was filed as part of motion for a seven day extension admittedly did not conform to the formatting requirements of the 11th Cir. and the Fed. R. App. P., pursuant to 11th Circuit Local Rule 32-4:

> Unless each copy of the brief, in the judgment of the clerk, conforms to this rule and to provisions of FRAP 32(a), the clerk may conditionally file the brief, subject to the requirement that the party file in the office of the clerk a complete set of replacement briefs which comply with FRAP and circuit rules within 14 days of issuance of notice by the clerk that the briefs have been conditionally filed. The clerk's notice shall specify the matters requiring correction. The time for filing of the opposing party's brief runs from the date of service of the conditionally filed brief

and is unaffected by the later substitution of corrected copies pursuant to this rule.

In light of this rule, Appellant timely filed a copy of the initial draft brief on November 5, 1998, prior to the November 6, 1998, deadline set forth by this Court and then resubmitted confirming copies within one (1) week of the submission of the nonconforming copy.

12. The total time on Appellant's three (3) motions to extend did not exceed the original thirty (30) days requested in Appellant's original motion for extension of time.

13. All three (3) of Appellant's original motions for extension of time were filed prior to the filing deadline set forth by this Court.

14. Appellant's original thirty (30) day extension of time was unopposed by Appellee's counsel. Consistent with this agreement, Appellee never filed a motion opposing Appellant's additional two motions for extension of time.

15. On Thursday November 12, 1998, the undersigned filed a final copy of his initial brief conforming to the 11th Cir. Local Rules and Fed. R. App. P. (The original briefs and the appendix have been resubmitted to this Court as part of these motions).

16. On December 10, 1998, the Appellee served a copy of its Answer Brief.

17. Upon receipt of Appellee's Answer Brief, the undersigned reviewed the Answer Brief and had already began to prepare a Reply Brief.

18. On December 11, 1998, thirty-six (36) days after Appellant filed its final motion for a seven (7) day extension of time, which included a draft of the initial brief and twenty-eight (28) days after Appellant filed its initial brief, and one (1) day after the Appellee's served their Answer Brief, a single member ofthis Court

entered an order denying Appellant's motion for a seven day extension and the Clerk entered an order of dismissal on the same day.

19. On December 14, 1998, Appellant's office received a notice of mediation, dated December 11, 1998, the same date on which this Court entered its order of dismissal. (See, attached Exh. "3").

20. Prior to receipt of this court's order of dismissal, Appellant's office had begun to prepare to the comply with this Court's notice of mediation.

21. The Clerk's entry of an order of dismissal causes the Appellant irreparable harm because it will forever bar Appellant from having her case decided on the merits.

22. Due to the severity of harm resulting from the court's order, the undersigned requests this court excuse him from any resulting inadvertent non-compliance with 11th Circuit local rule 27(b).

## MEMORANDUM OF LAW

A number of mitigating factors, as stated *supra.*, surrounding this case make the entry of an order dismissal to contravene interests of justice and dispose of this case for reasons other than the merits.

Courts have determined that dismissal is warranted where bad faith, egregious behavior, or negligence has been shown. *Sauviac vs. Sentry Ins., et. al.* 1997 U.S. Dist. LEXIS 7544 (May 16, 1997) at *3 *citing, In re Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985). The Eleventh Circuit has continued to espouse the same philosophy of the Fifth Circuit that "...the late filing of briefs is at most [a] non-jurisdictional [defect] in the prosecution of

this appeal, which we consider insufficient to warrant dismissal."[5] *Marcaida v. Rascoe,* 569 F. 2d 828, 830 (5th Cir. 1978). This Court has held that "dismissal typically occurs in cases showing consistently dilatory conduct or the complete failure to take any steps other than the mere filing of a notice of appeal." *In re Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985).

In *Sauviac*, the pertinent facts were that the appellants filed their brief four days late. *Sauviac*, at *3. The appellants additionally untimely filed other documents. *Id.* The appellants failed to even explain their filing delays. *Id.* The court reasoned that "there is no evidence of bad faith or disinterest in prosecuting the appeal. Thus, based on the short filing delays and the appellants' efforts to cure the defects in their appeal, the court determines that the conduct of the [appellants] was not sufficiently egregious to merit dismissal." *Id.* at *3 -*4.

The facts of the instant case are not nearly as egregious as that of the precedent case. In the instant case, Appellant's initial brief was due to be filed on November 6, 1998. Prior to this date, Appellant filed a motion for extension on November 5, 1998, and filed a non conforming copy of its initial brief along with its motion for extension to show he was working diligently and in good faith. Within one week thereafter, Appellant filed a conforming copy of its initial brief with this court.

Appellants original motion for a thirty (30) day extension of time was unopposed. All three (3) of Appellant's motions for extensions of time were filed prior to the deadline for filing the initial brief and did not exceed the originally requested unopposed thirty (30) day extension of time. Additionally, while Appellant asked for a thirty (30) day extension of time, pursuant to Fed. R. App. P. 25(2)(B) and 26(b), Appellant may, in actuality, have been

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[5] The court contrasted failure to file a timely notice of appeal which is a jurisdictional defect to the failure of timely filing an initial brief which is non jurisdictional and, therefore, governed by a more flexible standard. *In re Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985).

asking for a twenty-three (23) day extension of time depending whether the time begins to run upon receipt of the forty (40) day notice. With its final motion for a seven (7) day extension of time, Appellant filed a nonconforming copy of its initial brief showing this Court that its delay in filing its initial brief was not a dilatory tactic. Rather, due to external deadlines, over which the undersigned had no control, the undersigned had no choice, but to file a motion for extension requesting that this Court grant him another seven (7) days equivalent to his originally requested and unopposed motion for extension of time.

This Court's decision to reinstate this appeal would in no way prejudice the Appellees because they have already served their Answer Brief and as stated in Appellee's counsel's correspondence, they had calendared Appellant's initial brief to be due on November 13, 1998. However, the dismissal of this appeal results in irreparable harm to the Appellant as it forever bars her from having a court decide her claim on the merits. Additionally, the Appellant has already begun to prepare a reply brief and began preparation for compliance with this Court's notice of mediation.

Appellant's timely filed notice of appeal, three (3) motions for extensions, initial brief, preparation for mediation and reply brief, and Appellee's Answer Brief are signs of a case in the midst of prosecution, rather than signs a failure to prosecute these issues which would support a basis for the clerk's entry of an order of dismissal for lack of prosecution.

**WHEREFORE,** Appellant, KATHY-LYNN JOSENHANS, requests this Court to accept the non confirming copy of the initial brief as timely filed and reinstate the appeal.

**WHEREFORE,** Appellant, KATHY-LYNN JOSENHANS, alternatively requests this Court allow her leave to file her initial brief outside of the scheduled time.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and facsimile to William Lawton, Esquire, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, FL 32802-2928 this 17th day of December, 1998.

s/

FREDERICK C. MORELLO, P.A.
Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
Daytona Beach, Florida 32115
(904) 252-0754 Fax (904) 252-0921
Attorney for Plaintiff/Appellant

## APPENDIX H

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

No. 98-3107

***Filed***
***Jan 25 1999***

**KATHY-LYNN JOSENHANS,**
**Plaintiff/Appellant,**

versus

**SHERWOOD MEDICAL CORPORATION,**
**AMERICAN HOME PRODUCTS CORPORATION, Et. Al.,**
**Defendants/Appellees.**

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: CARNES and HULL, Circuit Judges,

BY THE COURT:

Appellant's motion to reconsider this court's order entered December 11, 1998 denying her motion for a third extension of time to file her brief and record excerpts is DENIED.

Appellant's motion to reinstate this appeal is DENIED.

Appellant's motion to file her brief and record excerpts out of time is DENIED AS MOOT.

## APPENDIX I

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**56 Forsyth Street, N.W.**
**Atlanta, GA 30303**

**KATHY-LYNN JOSENHANS,**
**PLAINTIFF/APPELLANT,**

**V.** **CASE NO: 98-3107**
**District Court No: 96-00829-CV-ORL-18A**

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, and AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN-UNITED STATES,**
**DEFENDANTS/APPELLEES. /**

TO: William E. Lawton, Esquire
DEAN, RINGERS, MORGAN & LAWTON
P.O. Box 2928
Orlando, FL 32802-2928

**APPELLANT'S PETITION FOR REHEARING EN BANC OF THIS COURT'S ORDER DATED JANUARY 25, 1999.**

s/

Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
Daytona Beach, Florida 32115
(904) 252-0754 Fax (904) 252-0921
Attorney of Record for Plaintiff/Appellant

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**CASE NO:98-3107**

*Kathy-Lynn Josenhans v. Sherwood Medical Corp. et. al.*

**APPELLANT'S CERTIFICATE OF INTERESTED PERSONS**

Pursuant to the 11th Cir.R.26.1, the Appellant files the following list of individuals with any known interest in the outcome of this appeal:

1) Kathy-Lynn Josenhans - Appellant/Plaintiff

2) Sherwood Medical Corp. - Appellee/Defendant

3) American Health Products Corp. - Appellee/Defendant

4) American Home Products Corp. Insurance Plan - United States - Appellee/Defendant

5) Dean, Ringers, Morgan & Lawton, P.A. - Counsel for the Appellees/Defendants

6) William E. Lawton, Esq.

7) Law Offices of Frederick C. Morello, P.A. - Counsel for the Appellant/Plaintiff

8) Frederick C. Morello, Esq.

9) Judge G. Kendall Sharp, U.S. District Judge, Middle District of Florida, Orlando Division

s/

Frederick C. Morello, Esq.
Fla. Bar No: 0714933
Attorney for Plaintiff/Appellant

## STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

This proceeding involves three questions of exceptional importance which if left undecided would result in a decision dismissing this appeal on non-jurisdictional grounds, ignoring the merits of this appeal and would also result in precedent-setting error of exceptional importance which is in direct conflict with this Court's own operating rules and precedent:

a.) Whether this Court's Order dated January 25, 1999, contravenes 11th Circuit Local Rule 32-4(c) which allows for the conditional filing of a nonconforming brief with a fourteen (14) day period to cure any nonconformity and 11th Circuit precedent allowing for the conditional filing of nonconforming briefs;

b.) Whether an appellant is entitled to a fourteen (14) day notice from the clerk before a case may be dismissed for failure to prosecute (R. 42-1(b)); and

c.) Whether this Court's Order dated January 25, 1999, contravenes 11th Circuit precedent and the 11th Circuit Local Rules 42-1(b),(c) stating that the Court must consider other lesser sanctions prior to dismissal of an appeal for failure to prosecute.

**APPELLANT'S EMERGENCY PETITION FOR EN BANC REHEARING OF THE PARTIAL PANEL'S[1] ORDER AND/OR EMERGENCY MOTION FOR PANEL CLARIFICATION[2] OF THE COURT'S ORDER DATED JANUARY 25, 1999, WITH INCORPORATED MEMORANDUM OF LAW**

The Appellant, KATHY-LYNN JOSENHANS, pursuant to Fed. R. App. P. 40 requests the entire panel or the Court en banc to review its Order dated January 25, 1999, and either accept the Appellant's nonconforming initial brief as timely filed or consider and impose sanctions less severe than that of dismissal. As grounds therefore, Appellant states[3]:

**STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE**

1. Appellant seeks en banc rehearing of this Court's Order dated January 25, 1999, which disposes this case with finality on nonjurisdictional grounds and without ever considering the merits.

2. This dismissal's ultimate effect is inconsistent with this Court's I.O.P. and contravenes 11th Circuit precedent case law deciding the issue of dismissal of appeals. If the Court chooses to depart from its own I.O.P. in providing less guarantees than the rules

---

[1] Two of three Judges rendered the Panel's Order of January 25, 1999. One Judge entered the original Order dated December 11, 1998 denying a one week extension to file a final conforming brief.

[2] Pursuant to the 11th Circuit's Internal Operating Policy (I.O.P.) under Fed. R. App. P. 36, a party may file a motion to amend, correct, or settle the judgment.

[3] In view of the 11th Cir. I.O.P. on Petition For Panel Rehearing which admonishes counsel that such a petition "is not to be used for reargument of the issues previously presented..." However, considering the severe and harsh results imposed by this Court's entry of dismissal, the Appellant urges the panel or the Court en banc reviewing her Petition that they review the facts and supporting legal argument in Appellant's emergency motions dated December 17, 1998.

provide, then the principles of due process dictate that the Court should put practitioners on notice of such departures before they occur. Notably, the most recent revisions to the 11th Cir. Local Rules have provided for just the opposite result. The most recent 11th Cir. Local Rule 27-1 and the 11th Cir. I.O.P., as revised on 12/98, refer to the Clerk's authority to grant "moderate extensions of time." The 11th Circuit's previous I.O.P. pursuant to 11th Cir. Local Rule 31-2 as of February 1, 1998, however, stated that "the clerk is authorized to grant uncontested requests for short extension of time to file briefs." The shift in language from "short" to "moderate" is indicative of a more flexible, rather than stringent, standard governing extensions of time and provides no notice to practitioners of a more stringent standard governing extensions of time.

3. On October 12, 1998, the Appellant filed an unopposed motion for a thirty (30) day extension of time to file her initial brief due to docket conflicts. Appellant never requested more than a thirty (30) day extension of time. The clerk partially granted this motion allowing the Appellants a fourteen (14) day extension of time on October 14, 1998. On October 27, 1998, the Appellant filed her second unopposed motion with the clerk requesting a fourteen (14) day extension of time. The clerk partially granted this motion allowing the Appellant a seven (7) day extension of time on October 30, 1998. Instead of filing a nonconforming brief pursuant to 11th Cir. Local 32-4(c) which would have allowed Appellant fourteen (14) days to correct any nonconformities, Appellant filed with the court her unopposed motion for a seven (7) day extension of time on November 4, 1998, with an attached nonconforming fifty-four (54) page draft of her initial brief. The Appellant filed final conforming copies of her initial brief on November 12, 1998. Appellees filed an Answer Brief within thirty (30) days. On December 11, 1998, thirty-six (36) days after Appellant had filed her last motion for a seven day extension of time and, ironically, one day after an answer brief was filed, a single judge denied Appellant's motion for a seven (7) day extension of time. The clerk then dismissed this appeal on December 11, 1998.

4. Pursuant to Fed. R. App. P. 40(a):

> [Petition for Panel Rehearing] Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked.... If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such orders as are deemed appropriate under the circumstances of the particular case.

5. Upon receipt of the Clerk's Order of dismissal dated December 11, 1998, Appellant immediately filed an "Emergency Motion For Panel Consideration To Vacate the Clerk of the Court's Entry of Dismissal Dated December 11, 1998, and to Reinstate The Appeal With Incorporated Memorandum of Law" on approximately December 17, 1998.

6. On the same date, Appellant also immediately filed a second "Emergency Motion for Panel Reconsideration of the Clerk of the Court's Entry of Dismissal Dated December 11, 1998, and To Reinstate the Appeal and Appellant's Motion for Leave to File Brief Outside of the Scheduled Time with Incorporated Memorandum of Law."

7. In Appellant's second emergency motion, of December 17, 1998, Appellant specifically requested ". . . this Court to accept the non conforming copy of her initial brief as timely filed and reinstate the appeal."[4] Appellant also cited to case law of this circuit holding that a court must consider lesser sanctions prior to dismissal for lack of prosecution.

---

[4] Appellant had timely filed a fifty-four (54) page nonconforming copy of her initial brief with the Court which was attached to her motion for a seven (7) day extension of time.

8. In the interim period, Appellant's office regularly called the 11th Circuit Clerk's Office to check on the status of her emergency motions.

9. On January 25, 1998, two members of the panel denied Appellant's emergency motions. The Order, which is attached to this Petition, held:

> Appellant's motion to reconsider this court's order dated December 11, 1998 denying her motion for a third extension of time to file her brief and record excerpts is DENIED.
>
> Appellant's motion to reinstate this appeal is DENIED.
>
> Appellant's motion to file her brief and record excerpts out of time is DENIED AS MOOT.

10. The fact that all of Appellant's motions for extensions of time were filed prior to the existing deadline for filing the initial brief, a nonconforming copy of the initial brief was attached to Appellant's final motion for a seven (7) day extension of time, and Appellant's prompt responses to this Court's orders of dismissal are all indicative of the undersigned's efforts to expeditiously process this appeal and not indicative of any prolonged indifference and/or contumacious conduct on the part of the undersigned. Additionally, if this appeal were reinstated, Appellees can claim no prejudice because their answer brief had already been filed one (1) day before the Court entered an order denying Appellant's seven (7) day extension of time.

11. In paragraph eleven (11) of the Appellant's second emergency motion for reconsideration of the clerk's entry of dismissal dated December 11, 1998, Appellant specifically cites to 11th Cir. Local Rule 32-4 which states:

> Unless each copy of the brief, in the judgment of the clerk, conforms to this rule and to provisions of FRAP 32(a), the clerk may conditionally file the brief, subject to the

> requirement that the party file in the office of the clerk a complete set of replacement briefs which comply with FRAP and circuit rules within 14 days of issuance of notice by the clerk that the briefs have been conditionally filed. The clerk's notice shall specify the matters requiring correction. The time for filing of the opposing party's brief runs from the date of service of the conditionally filed brief and is unaffected by the later substitution of corrected copies pursuant to this rule.

12. In the undersigned's prior cases in the 11th Circuit, the 11th Circuit has followed the precedent of its own rules and operating procedures allowing for the conditional filing of nonconforming briefs and allowing counsel fourteen (14) days to correct any nonconformities. (See, attached Exh. "1," where another lawyer practicing before this Circuit has had the same rule apply.)

13. In *Glisson v. Interim Serv. Inc.*, appellate case no.: 97-2157, this Court allowed the undersigned counsel to correct nonconformities of his brief. This Court's notice specifically stated in bold capital letters **"HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE."** In *Golden v. School Board of Volusia,* a case where the undersigned counsel has no involvement, both appellants and appellees were given fourteen (14) days to cure such nonconformities as the failure to include a statement of the case, failure to include durable covers on the front and back, and failure to include a certificate of service. (See, attached comp. Exh. "2"). In the instant case, the Appellants submitted a draft of their initial brief and asked for an additional seven (7) days thereafter to submit conforming copies of her initial brief and record excerpts in full compliance with the 11th Circuit Local Rules. This was done to show the Court that Appellant's counsel was not being dilatory or procrastinating his brief writing work. The Appellant filed conforming copies of her brief on November 13, 1998. Appellees timely filed their answer brief.

14. In the instant action, this Court overlooks, in its Order of January 25, 1999, the Appellant's request that this Court accept

Appellant's timely filed nonconforming brief that was filed within the time allowed by the clerk in the clerk's second extension of time for seven (7) days. In addition, the failure to accept Appellant's timely filed nonconforming brief contradicts 11th Circuit precedent and local rules of accepting nonconforming briefs as timely filed subject to allowing two (2) weeks to correct any nonconformities. Ironically, had the Appellant filed her final motion for extension of time with the clerk and the clerk deemed the nonconforming brief filed pursuant to 11th Cir. Local Rule 32-4(c), the Appellant would have had fourteen (14) days to file a conforming brief. This was seven (7) days more than the Appellant was requesting from the Court to do so. Realizing the applicability of Rule 32-4(c), the Appellant attached a nonconforming brief to her final motion for a seven (7) day extension of time filed with the court instead of the clerk and within seven (7) days thereafter, filed conforming copies of her initial brief.

15. Additionally, Rule 42-1(b) provides that the clerk shall issue a notice to counsel "that upon the expiration of 14 days from the date thereof the appeal will be dismissed for want of prosecution if the default has not been remedied." Appellant never received any such notice from the clerk or the court that a dismissal was being considered. Once the court denied the Appellant's motion for extension, the clerk entered a dismissal. This result is an absurdity given the operations of the rules and the internal operating policy of this Court.

16. This Order overlooks the Appellant's requested relief that ". . . this Court accept the non conforming copy of the initial brief as timely filed and reinstate the appeal." This Order also overlooks this Court's precedent case law cited by Appellant in her emergency motions holding that a Court must consider lesser sanctions prior to dismissal. No record evidence exists suggesting that lesser sanctions were even considered prior to the dismissal of this action.

## ARGUMENT AND AUTHORITIES

In her emergency motions, Appellant cited to an abundance of case law discussing the issue of dismissal of an appeal. *See e.g., In Re Beverly Manufacturing Corp. v. Tavormina*, 778 F.2d 666, 667 (11th Cir. 1985) (holding "...dismissal typically occurs in cases showing consistently dilatory conduct or the complete failure to take any steps other than the mere filing of a notice of appeal."); *See also, Sauvia v. Sentry Ins., et. Al.*, 1997 U.S. Dist. LEXIS 7544 at *6 (E.D. La. May 16, 1997) (denying a motion to dismiss to dismiss for failure to timely file a brief where the brief was four (4) days late and the tardy party failed to provide any explanation for their tardiness.); *See also, Marcaida v. Rascoe*, 569 F.2d 828, 829 (5th Cir. 1978) (denying a dismissal even though counsel never served his motions of extension of time to opposing counsel, asked the clerk for his first extension of time by telephone and without a written motion, and failed to serve his subsequent motions for an extension of time).

The undersigned has yet to find a case where any Appellate Court dismissed an appeal for lack of prosecution in facts paralleling those of the instant case, where the party filed her unopposed motions for extensions of time prior to the filing deadline for the initial brief, filed an initial complete draft brief with her final motion for extension of time and within seven (7) days filed her initial brief with record excerpts, and the total time from the original due date to the filing of the was thirty (30) days. The Appellees even filed an answer brief prior to the ruling on Appellant's motion for a seven (7) day extension of time.

In the instant action, no record evidence exists evincing that lesser sanctions were ever considered prior to the dismissal of this action. The 11th Circuit Local Rules contemplate a process whereby lesser sanctions are considered prior to imposing the harsh remedy of dismissal. 11th Circuit Local Rule 42-1(b) states in pertinent part:

(b) Dismissal for Failure to Prosecute. Where appellant fails to file the record or a brief...the clerk shall issue a notice to

counsel...that upon the expiration of 14 days[5] from the date thereof the appeal...will be dismissed for want of prosecution if the default has not been remedied. If an appellant is represented by counsel, the clerk may refer the matter to the court for possible disciplinary action in lieu of dismissal.

(c) Other. In lieu of the procedures described in (b), the court may take such other or different action as it deems appropriate.

This process of considering lesser sanctions prior to dismissal is also evinced in this Court's Internal Operating Procedure (I.O.P.) under Fed. R. App. P. 26 – Computing and Extending Time. The I.O.P. states:

> 1. Extensions of Time. Failure to process an appeal timely may cause it to be dismissed for want of prosecution, under the provisions of 11th Cir. R. 42-1(b), or may result in possible disciplinary action against counsel as described in Addendum Eight, or both.

In *Long v. Simmons*, 77 F.3d 878, 879 (5th Cir. 1996), the lower court dismissed an action because of the party's failure to timely file disclosure forms. The appellate court reversed finding that the lower court's dismissal was an abuse of discretion. The appellate court reasoned that:

> A dismissal with prejudice is appropriate only if the failure to comply with the court order was the result of purposeful delay or contumaciousness and the record reflects that the district court employed lesser sanctions before dismissing the action. Id. *See also, United States v. Douglas*, 220 B.R. 328, 331 (E.D. Tx. 1998) (holding that "districts courts are charged with the duty of considering the efficacy of lesser sanctions before deciding to dismiss a bankruptcy appeal. Lesser sanctions, such as imposing costs or a fine on an

---

[5] No notice was ever sent to the Appellant by the clerk or the court.

attorney, can be very effective in punishing a negligent attorney and deterring further dilatory practice.").

In addition, a plethora of case law exists from this Court holding a district court's dismissal of action as an abuse of discretion where the district court did not consider sanctions in the alternative to the ultimate sanction of dismissal. *See, Phipps v. Blakeney,* 8 F.3d 788, 791 (11th Cir. 1993) (reasoning that "to state why lesser sanctions will not do is a good practice on the part of a district court using dismissal as a sanction"); *See also, Carter v. United States of America,* 780 F.2d 925, 927 (11th Cir. 1986)(opining that "case law makes clear that the dismissal of an action is a sanction of last resort, applicable only in extreme circumstances. The district court...made no explicit finding that lesser sanctions would not be appropriate."); *See also, Marshall v. United States Dep't of Labor,* 621 F.2d 763, 768 (5th Cir. 1980) (holding that "dismissal is too harsh a sanction where a number of factors, singly or in combination are present....Dismissal is generally inappropriate and lesser sanctions are favored where neglect is plainly attributable to an attorney rather than to his blameless client.").

## CONCLUSION

The Appellant should not be punished by dismissing her appeal for deciding to file a motion for an extension of time with the Court, instead of the clerk, with an attached nonconforming brief requesting half the time (7 days) the clerk allows (14 days) to file a final conforming copy. Rather than accepting this brief as conditionally filed pursuant to its own I.O.P. or considering sanctions less severe than dismissal, the Court imposed the a draconian sanction of dismissal on nonjurisdictional grounds never reaching the merits of the appeal. The Appellant requested that this Court accept its nonconforming brief as conditionally filed and cited precedent from this Court finding that a court must consider lesser sanctions prior to dismissal, the ultimate sanction. In its Order dated January 25, 1999, the partial panel never addressed these requests.

In the interests of deciding the instant action on its merits and in compliance with the 11th Circuit precedent and local rules, both of which have been cited, supra, Appellant requests this Court to accept her nonconforming brief as conditionally filed.

In the alternative, Appellant requests this Court to consider and impose sanctions less severe than that of dismissal of her appeal.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and facsimile to William Lawton, Esquire, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, FL 32802-2928 this 6th day of February, 1999.

s/

Frederick C. Morello, Esquire
Florida Bar No. 0714933
Post Office Box 1007
Daytona Beach, Florida 32115
(904) 252-0754 Fax (904) 252-0921
Attorney of Record for Plaintiff/Appellant

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

January 16, 1998

William D. Palmer
Palmer and Palmer
255 S. Orange Ave., Suite 1600
Orlando, FL 32801

***Plaintiff's Exhibit 1***

RE: 97-2157 Glisson v. Interim Services Inc.
DC DKT NO.: 95-01119 CV-ORL-18

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The brief filed by you in the referenced appeal is deficient because it does not contain:

Cover of correct color. Fed.R.App.P. 32(a)
Adequate letter size (point) and/or spacing (pitch). 11th Cir.R. 32-4

One copy of your brief has been filed, subject to receipt of seven (7) copies of a corrected brief within FOURTEEN (14) DAYS from this date. If you fail to timely file a corrected brief the Court will determine whether this brief should be stricken for failure to comply with the Rules. For appellants this may result in dismissal of the appeal pursuant to 11th Cir.R. 42-1(b), while appellees would not be heard at oral argument, except by permission of the Court pursuant to Fed.R.App.P. 31(c). The corrected brief must be served on all parties to this appeal. HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE.

Sincerely,
s/
THOMAS K. KAHN, CLERK
Reply To: Lois Tunstall (404) 335-6177

BR-8(2/96)

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

November 10, 1997

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 97-2157 Glisson v. Interim Services Inc.
DC DKT NO.: 95-01119 CV-ORL-18

Our records in the referenced appeal indicate that the appellant's brief is presently scheduled to be filed by counsel on November 24, 1997.

This notice is sent both to remind you of this upcoming due date and to call to your attention the provisions of this court's internal operating procedures following FRAP 26, which provide:

> "The court requires the timely filing of all papers within the period of time allowed by the rules. Without granting extensions of time, except upon submission of documentary evidence of extraordinary circumstances (e.g., court dockets or calendars which establish insoluble conflicts, medical evidence of illness). Failure to process an appeal timely may cause it to be dismissed for want of prosecution under the provisions of 11th Cir.R. 42-1(b)."

Counsel need not respond to this notice unless it will not be possible to make the necessary filing on time. In that event, counsel should proceed in accordance with the provisions of FRAP 26, 11th Cir.R. 26-1 and FRAP 31.

Sincerely,
s/
THOMAS K. KAHN, CLERK

Reply To: Lois Tunstall (404) 331-6147 BR-6 (6/91)

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

August 3, 1998

***Plaintiff's Exhibit 2***

J. Lester Kaney
Cobb Cole & Bell
150 Magnolia Ave.
Daytona Beach, FL 32114

RE: 98-2041 Golden v. School Board of Volusia
DC DKT No.: 96-01000 CIV-ORL-18

---

The brief filed by you in the referenced appeal is deficient because it does not contain:

Statement of Case pursuant to 11th Cir.R. 28-2(i).

One copy of your has been filed, subject to receipt of seven (7) copies of a corrected brief within FOURTEEN (14) DAYS from this date. If you fail to timely file a corrected brief the Court will determine whether this brief should be stricken for failure to comply with the Rules. For appellants this may result in dismissal of the appeal pursuant to 11th Cir.R. 42-1(b), while appellees would not be heard at oral argument, except by permission of the Court pursuant to Fed.R.App.P. 31(c). The corrected brief must be served on all parties to this appeal. HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE.

Sincerely,
s/
THOMAS K. KAHN, Clerk
Reply To: Belinda Hunte (404) 335-6168
BR-8 (2/96)

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

July 5, 1998

Valerie P. Foote
VALERIE P. FOOTE, P.A.
2750 S. Ridgewood Ave., Bldg. B., Suite 2
South Daytona, FL 32119

RE: 98-2041 Golden v. School Board of Volusia
DC DKT NO.: 96-01000 CIV-ORL-18

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The record excerpts filed by you in the referenced appeal are deficient because they do not include the following items from the record as required by 11th Cir.R. 30-1:

Materials not permitted by 11th Cir.R. 30-1 are included, as follows: Include a certificate of service in each copy.

One copy of your has been filed, subject to receipt of five (5) copies of corrected record excerpts within FOURTEEN (14) DAYS from this date. If you fail to timely file corrected record excerpts the Court will determine whether these record excerpts should be stricken for failure to comply with the Rules. This may result in dismissal of the appeal pursuant to 11th Cir.R. 42-1(b).

Sincerely,
s/
THOMAS K. KAHN, CLERK
Reply To: Lois Tunstall (404) 331-6147
BR-6 (6/91)

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

July 5, 1998

Valerie P. Foote
VALERIE P. FOOTE, P.A.
2750 S. Ridgewood Ave., Bldg. B., Suite 2
South Daytona, FL 32119

RE: 98-2041 Golden v. School Board of Volusia
DC DKT NO.: 96-01000 CIV-ORL-18

---

The brief filed by you in the referenced appeal is deficient because it does not contain:

Cover of correct color. Fed.R.App.P. 32(a)
Adequate letter size (point) and/or spacing (pitch). 11th Cir.R. 32-4
Briefs must have blue durable covers on both front and back.
Type size should be AT LEAST 14 point.

One copy of your brief has been filed, subject to receipt of seven (7) copies of a corrected brief within FOURTEEN (14) DAYS from this date. If you fail to timely file a corrected brief the Court will determine whether this brief should be stricken for failure to comply with the Rules. For appellants this may result in dismissal of the appeal pursuant to 11th Cir.R. 42-1(b), while appellees would not be heard at oral argument, except by permission of the Court pursuant to Fed.R.App.P. 31(c). The corrected brief must be served on all parties to this appeal. HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE.

Sincerely,
s/
THOMAS K. KAHN, CLERK

Reply To: Lois Tunstall (404) 335-6177 BR-8 (2/96)

**APPENDIX J**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

***Filed***
***MAR 16 1999***

No. 98-3107

**KATHY-LYNN JOSENHANS,**
**Plaintiff/Appellant,**

versus

**SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, Et. Al.,**
**Defendants/Appellees.**

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: CARNES and HULL, Circuit Judges,

BY THE COURT:

This matter is before this court on Appellant's petition for rehearing en banc of this court's January 25, 1999 order denying Appellant's motions to reinstate this appeal, file Appellant's brief and record excerpts out of time, and to reconsider Appellant's motion for a third extension of time.

The clerk initially refused to accept this petition construing it as a successive motion for reconsideration of this court's December 11, 1998 order denying Appellant's motion for a third extension of time. See 11th Cir.R. 35-4 ("Administrative" or

"interim" matters not considered en banc.) Counsel for Appellant returned the rehearing petition, insisting that this court consider it.

The clerk was correct to construe the rehearing petition as a motion for reconsideration pursuant to 11th Cir.R. 35-4. The matters from which Appellant seeks further review are "administrative matters." The clerk was also correct to refuse to file the pleading to the extent that Appellant sought further reconsideration of a prior order denying reconsideration of Appellant's third extension request. This court does not consider successive reconsideration motions.

However, this court can consider Appellant's request to reconsider the motions to reinstate the appeal and to file the brief and record excerpts out of time. Appellant has not yet sought reconsideration of those motions.

On reconsideration, Appellant's motions to reinstate this appeal and to file her brief and record excerpts out of time are **DENIED**.

Supreme Court, U.S.
FILED
JUL 26 1999
OFFICE OF THE CLERK

No. 99-18

In The

# Supreme Court of the United States

KATHY LYNN JOSENHANS,

*Petitioner,*

vs.

SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, AND AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN – UNITED STATES,

*Respondents.*

**On Petition For Writ Of Mandamus To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM E. LAWTON, ESQUIRE
Fla. Bar No. 0163236
*Counsel of Record*
LAMAR D. OXFORD, ESQUIRE
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407/422-4310

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW (RESTATED)

Whether a Circuit Court abuses its discretion by dismissing an appeal for Appellant's lack of prosecution and failure to comply with briefing deadlines established by the Court's Rules and Orders.

## PARTIES TO THE PROCEEDING

Petitioner, Kathy Lynn Josenhans and her attorney, Frederick C. Morello, Law Office of Frederick Charles Morello, P.O. Box 1007, Daytona Beach, Florida 32115, appeared before the Eleventh Circuit Court of Appeals as plaintiff-appellant.

Respondents, Sherwood Medical Corporation, American Home Products Corp., and American Home Products Corp., Group Insurance-Plan – United States and their attorney, William E. Lawton, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, Florida 32802-2928, appeared before the Eleventh Circuit Court of Appeals as defendants-Appellees.

Respondents note in particular that Petitioner has violated the requirements of this Honorable Court's Rule 20(3)(a), which states:

> **"(3)(a) A Petition seeking a writ of prohibition, a *Writ of Mandamus*, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other Court."**

Petitioner has failed to state the name and office of every person against whom relief is sought by this Petition for Mandamus, particularly including the Honorable Judges of the Eleventh Circuit Court of Appeals to whom the Petition for Mandamus filed in this Honorable Court must be properly addressed. They include:

PARTIES TO THE PROCEEDING – (Continued)

"(1) **The Honorable Edward Carnes**
**Judge of the U.S. Court of Appeals for the Eleventh Circuit**
**56 Forsyth Street, N.W.**
**Atlanta, Georgia 30303**

"(2) **The Honorable Stanley Marcus**
**Judge of the U.S. Court of Appeals for the Eleventh Circuit**
**56 Forsyth Street, N.W.**
**Atlanta, Georgia 30303**
(See, Appendix J to Petition for Mandamus)

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*Pioneer Service Co. v. Brunswick Assoc., Ltd., Partnership*, 507 U.S. 380 (1993) ..... 5, 7

*Turner v. Duval County, Florida*, 468 F.2d 919 (5th CCA Fla. 1972) ..... 5, 6

*United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th CCA Fla. 1972) ..... 5

## ORDERS ENTERED BELOW

Petitioner Josenhans seeks this Honorable Court's issuance of the *Writ of Mandamus* to the United States Court of Appeals for the Eleventh Circuit, for its Judgment and Opinion entered March 16, 1999 (Appendix "J" to Josenhans' Petition). Petitioner also seeks this Honorable Court's review and issuance of the *Writ of Mandamus* to the Eleventh Circuit Court of Appeals for its Order denying Appellant Josenhans' third request for an extension of time for filing the Initial Brief and entry of dismissal of the appeal. (Appendix "F" to Petition), and Order denying Motion for Reconsideration (Appendix "H" to Petition).

## STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner Josenhans attempts to invoke this Honorable Court's *Mandamus* jurisdiction under 28 U.S.C. § 1651.

## STATEMENT OF THE CASE

Respondents strongly object to the number of non-record, uncited allegations and improper arguments made in Petitioner's Statement of the Case. Respondents will provide the Court with a summary of only the record activity below. In the interest of brevity, references will be made to the documents already of record in the Appendix to the pending *Petition for Writ of Mandamus* made by (PA-___).

On July 21, 1998, the U.S. District Court for the Middle District of Florida entered a Final Order granting Respondents' Motion for Summary Judgment on all claims made against it by Plaintiff Josenhans. Counsel for Plaintiff Josenhans then filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. (PA-A).

On September 4, 1998, the Circuit Court informed Plaintiff Josenhans that the record was complete and Appellant's Initial Brief and Record Excerpts were due to be filed within forty (40) days, or by October 14, 1998. One day before that deadline, on October 13, 1998, Josenhans' counsel filed Appellant's first Motion for a 30-day extension of time to file the Initial Brief. (PA-B).

On October 14, 1998, the Circuit Court issued an Order granting Appellant Josenhans' Motion for Extension of Time, *in part*. The Court granted Josenhans' counsel fifteen (15) additional days to file Appellant's Brief, until October 29, 1998. (PA-C, ¶ 4). Additionally, the Circuit Court's Order specifically warned counsel for Appellant Josenhans that:

> **"This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date." (PA-C, ¶ 4).**

Despite that admonition, counsel for Josenhans filed still another Motion for an additional fourteen (14) day extension of time to file the Initial Brief. That Motion was dated October 27, 1998. (PA-D). By Memorandum Order dated October 30, 1998, the Circuit Court granted Appellant Josenhans an extension of time for *seven (7) days* until

November 6, 1998, for filing Appellant's Initial Brief. Again, the Circuit Court gave Josenhans' counsel the same warning that the extension was granted *only* subject to the condition that no additional extensions would be requested by the movant, and the specified document would be filed by November 6, 1998. (PA-D, ¶ 8-10).

Nevertheless, counsel for Appellant Josenhans filed still another (third) Motion for Extension of Time to file the Initial Brief. By Motion dated November 4, 1998, Appellant Josenhans requested another seven (7) day extension of time from the Circuit Court. (PA-G, ¶ 9-10). This third Motion for Extension of Time was filed one day before the Eleventh Circuit Court's third and final filing deadline of November 6, 1998. (PA-G, ¶ 10).

On November 12, 1998, counsel for Josenhans finally filed the Initial Brief of Appellant Josenhans. (PA-G, ¶ 15). That was six (6) days *after* the third and final deadline given by the Circuit Court for the filing of that Initial Brief.

On December 11, 1998, the Circuit Court of Appeals *sua sponte* entered its Order of Dismissal, for Appellant Josenhans' failure to timely file the Initial Brief. The Court also entered a simultaneous Order denying Appellant's third Motion for Extension of Time which sought until November 13, 1998 to file the Initial Brief. (PA-F).

On December 17, 1998, counsel for Appellant Josenhans filed an "Emergency Motion for Panel Consideration" of the Court's dismissal of the Appeal, and requested the Court reinstate the appeal. (PA-G). By Order filed January 25, 1999, a two-judge panel of the

Circuit Court entered an Order denying Appellant Josenhans' Motion to Reconsider the Court's Order of December 11, 1998, denying the Motion for a third extension of time and dismissing the appeal. The Court also denied Appellant's Motion to Reinstate the appeal. (PA-H).

Counsel for Josenhans then filed a Petition for Rehearing *en banc* by the Eleventh Circuit Court of its Order of January 25, 1999. (PA-H). By Order filed March 16, 1999, the Court of Appeals reviewed Josenhans' Petition for Rehearing *en banc* and the history of Josenhans' untimely prosecution of this appeal under the federal and local rules. (PA-J). In a two-page explanatory Order, the Circuit Court denied Appellant Josenhans' Motion to Reinstate the Appeal. (PA-J).

Petitioner Josenhans then filed a *Petition for Writ of Certiorari* with this Honorable Court, still pending in Case No. 98-2012. Respondents have filed a Brief in Opposition. Because that Petition is still pending before this Honorable Court, Respondents respectfully submit that the *Petition for Writ of Mandamus* filed by Petitioner Josenhans herein is redundant, duplicative, and a waste of this Honorable Court's time and resources. Respondents also note that Petitioner has apparently failed to serve the *Petition for Mandamus* on the additional proper parties to whom it is addressed, the Honorable Judges of the Eleventh Circuit of Appeals.

## ARGUMENT

Without question, the Circuit Courts of Appeal must have the discretion and authority to demand compliance with their rules and regulations. Chaos would reign in this Honorable Court if every party sanctioned for failure to comply with a Circuit Court rule or deadline could simply turn the United States Supreme Court for further review of a Circuit Court's procedural decision.

Even when the sanction is dismissal, this Honorable Court for its own good and that of the federal appellate system must allow Circuit Courts to set their own boundaries for compliance. As this Court has stated with regard to the failure of appellants to comply with procedural rules and time deadlines,

> **" . . . inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect."** ***Pioneer Service Co. v. Brunswick Assoc., Ltd., Partnership,*** **507 U.S. 380, 391 (1993).**

The Eleventh Circuit Court has rarely had to opine on that obvious doctrine, since it adopted as precedent the decisions of its parent (the former Fifth Circuit Court) rendered prior to October 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981). Even where the Appellant U.S. Government itself failed to timely file its Initial Brief on Appeal, the Circuit Court properly dismissed. *United States v. Aerodex, Inc.,* 469 F.2d 1003 (5th CCA Fla. 1972). *See also, Jackson v. Hensley,* 484 F.2d 992 (5th CCA Fla. 1973) (appeal summarily dismissed for lack of prosecution for Appellant's failure to file Brief within time fixed by the rules); *Turner v. Duval County, Florida,*

468 F.2d 919 (5th CCA Fla. 1972) (for Appellant's failure to file Brief within the time fixed by rules, appeal was properly dismissed for want of prosecution).

Nothing in Josenhans' argument in the *Petition for Mandamus* demonstrates to the contrary, or merits this Honorable Court's attention. The cases cited by Petitioner's counsel in support of the Petition do not involve, as here, the unsuccessful seeking of a third extension of time for filing a proper, conforming Brief after clear admonitions from the Court that only *one* extension would be granted. *See, i.e., In re Beverly Mfg. Corp.*, 778 F.2d 656 (11th Cir. 1985).

Josenhans concedes in the Petition that after *seeking* and *receiving* two prior extensions of time for filing the Initial Brief with the Eleventh Circuit Court, *and* each time being warned that no further extensions of time would be allowed or granted, Petitioner still filed a third Motion for Extension of Time on November 5, 1998 (one day before the Court's final deadline for filing) (Petition, p. 5-6). The argument that Petitioner's filing of a "54-page, non-conforming draft of her Initial Brief" on that date demonstrates that "Petitioner was not being dilatory" (Pet., p. 6) hardly rings true in that context. The Circuit Court's Order granting a rare *second* extension of time had specified that the *second* extension was granted *only* subject to the condition that no additional extensions would be requested or considered.

Simply put, this Honorable Court does not have the time or resources to continually delve into the Circuit Courts' decisions on appellants' failures to comply with their procedural rules and deadlines. This Court on a rare

occasion when it visited these issues restated the factors that the Courts of Appeal should consider in requiring compliance with their time deadlines:

> **"These include, as the Court of Appeals found, the danger of prejudice to the (opposing party), the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith."** ***Pioneer Service Co., supra,*** **at 391.**

Here, the *Petition for Writ of Mandamus* filed by Josenhans admits the multiple extensions of time Petitioner's counsel sought for filing the Initial Brief of Appeal *and* the warnings received when the Circuit Court granted two separate extensions of time. Petitioner's failure to heed those warnings and timely file the Brief conflict directly with the ultimate necessity that appeals meet procedural requirements and deadlines. Without same, the schedules of the Courts and opposing parties would be thrown into chaos. *Id.*

## CONCLUSION

For all the reasons stated herein or to be found from a review of the record documents attached to the *Petition for Mandamus* that this Brief opposes. Respondents respectfully submit that the *Petition for Writ of Mandamus* filed herein should be DENIED.

Respectfully submitted,

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